

1993

The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default

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Recommended Citation

Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 Neb. L. Rev. (1993)

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I. INTRODUCTION

Many federal causes of action do not have express statutes of limitations. For years lawyers, judges, and legal scholars have criticized the method by which limitations periods are determined for these claims.¹ Traditionally, the courts have borrowed the most analogous state statute of limitations unless applying state law would conflict with federal law or policy.² When a conflict occurs, the courts borrow the most analogous federal statute of limitations.³ Determining which state or federal limitations period is, in fact, the most analogous is often extremely difficult. As a result, borrowing has led to confusion, lack of uniformity, inequitable administration of federal rights, unfair surprise to litigants, and unnecessary waste of judicial time and resources.⁴

Congress attempted to address this problem in the Judicial Improvements Act of 1990.⁵ Section 313⁶ created a four-year general statute of limitations for federal statutory actions which do not have

1. See, e.g., *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1393-94 (7th Cir. 1990) (Posner, J., concurring) ("Borrowing a period of limitations from one statute to use with another that doesn't have its own limitations provision is a matter of which round peg to stuff in a square hole."), *cert. denied*, 111 S. Ct. 2887 (1991); Rick Marcus, Memorandum to the Workload Subcommittee on Providing Federal Limitations Periods for All Federal Claims, in 1 FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS JULY 1, 1990, REPORT OF THE SUBCOMMITTEE ON WORKLOAD, pt. V, at 12 [hereinafter Marcus, Memorandum] ("[T]here appears to be no significant support for perpetuating the current borrowing regime."); REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR ASSOCIATION ON THE APPLICATION OF STATUTES OF LIMITATIONS IN FEDERAL LITIGATION, in 1 FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS JULY 1, 1990, REPORT OF THE SUBCOMMITTEE ON WORKLOAD, pt. V, at 1, reprinted in 53 ALB. L. REV. 3 (1988) [hereinafter NYSBA REPORT]; David D. Siegel, *Practice Commentary on Amendment of Federal Rule 4* (Eff. Feb. 26, 1983) with *Special Statute of Limitations Precautions*, 96 F.R.D. 88, 97-100 (1983) [hereinafter Siegel, *Practice Commentary*]; Mitchell A. Lowenthal et al., Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1072-78, 1105 (1980) [hereinafter Special Project]. See also *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 157-70 (1987) (Scalia, J., concurring in judgment).
2. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171 (1983).
3. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983).
4. See *infra* text accompanying notes 104-210, 243-73.
5. Pub. L. No. 101-650, 104 Stat. 5089 (1990). The Judicial Improvements Act was enacted on December 1, 1990.
6. The Judicial Improvements Act of 1990 contains four titles. Section 313 is part of Title III, the Federal Courts Study Committee Implementations Act of 1990, Pub. L. No. 101-650, 104 Stat. 5104, 5114. Section 313 is codified at 28 U.S.C. § 1658 (Supp. 1991).

explicit limitations periods.⁷ However, the new "fallback" statute of limitations applies only to civil actions arising under federal statutes enacted after December 1, 1990.⁸ It does not apply to federal legislation enacted on or before December 1, 1990, federal common law, or implied rights of action arising under federal law.⁹ For the foreseeable future, most federal claims not governed by explicit limitations periods will arise under statutes enacted before December 1, 1990. Because section 313 only applies prospectively, the equitable and practical problems which borrowing creates will continue to plague the bar and bench.

Part II of this article discusses statutes of limitations and the policies they serve. Part III examines the problems created by borrowing analogous limitations periods. Part IV traces the legislative history of section 313. Part V examines the federal "fallback" statute of limitations and the problems it does not address. Based on this analysis, the article concludes that section 313 does not adequately address the problems of borrowing limitations periods and may actually delay adoption of a comprehensive solution.

In lieu of the current scheme, Congress should enact a general statute of limitations for all federal causes of action without explicit periods of limitations which accrue after the statute is enacted. A "fallback" limitations period for both existing and new federal causes of action would avoid the uncertainty and inequity of borrowing without unduly prejudicing potential litigants. Restricting its application

7. 28 U.S.C. § 1658 (Supp. 1991).

8. Section 313(a) provides in pertinent part:

Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section (Dec. 1, 1990) may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658 (Supp. 1991)(emphasis added).

Interestingly, § 313(c), which specifies the effective date of § 313(a), appears to conflict with § 313(a). Section 313(c) provides, "The amendments made by this section [§ 313] shall apply with respect to causes of action accruing on or after the date of the enactment of this Act (Dec. 1, 1990)." Pub. L. No. 101-650, 104 Stat. at 5115 (emphasis added). The NEW YORK STATE LAW DIGEST suggests that § 313(c) is "just careless boilerplate that should be subordinated to the crux of the statute's intention . . ." *Significant Changes in Federal Jurisdiction and Practice Part III-The "New" Federal Statute of Limitations*, N.Y. ST. L. DIG., Apr. 1991, at 1, 2 (David D. Siegel ed.). Although the wording of § 313(c) may be an oversight, § 313(a) and (c) are not necessarily inconsistent. Congress may pass statutes after December 1, 1990, which apply retroactively. Under § 313(c) the four-year general limitations period would only apply to those actions arising under such statutes which accrued on or after December 1, 1990.

9. The language of § 313 precludes causes of action implied under federal statutes enacted on or before December 1, 1990. It is unclear whether § 313 extends to implied causes of action arising under federal statutes enacted after December 1, 1991. See *infra* text accompanying notes 328-30.

to claims accruing after the enactment of the "fallback" statute would also prevent unfair surprise to those relying on past law.

II. STATUTES OF LIMITATIONS

A. The Nature of Limitations Periods

Statutes of limitations measure the time within which a litigant must assert his or her claim.¹⁰ They are measured from the date on which the claim accrues.¹¹ If the plaintiff fails to commence the action before the statute of limitations has run, his or her right to relief is lost.¹²

10. Statutes of limitations are not the only time limitations which affect rights of action. Common law time-bars, such as laches, may also bar claims. See Special Project, *supra* note 1, at 1014-15.

11. The accrual date will vary depending on the type of action. For example, tort actions are generally measured from the date of injury while contract actions are measured from the date of breach. See RESTATEMENT (SECOND) OF TORTS § 899 (1977); 18 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 2021A (3d ed. 1978). Although case law usually determines when a given cause of action arises, the statute which creates the right of action may specify the accrual date. See, e.g., N.Y. U.C.C. LAW § 2-725(2) (McKinney 1964) ("A cause of action [for breach of contract for a sale of goods] accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (1988) [hereinafter Title VII] (providing that a complainant must file a charge with the EEOC within 180 days, 300 days in a deferral state, "after the alleged unlawful employment practice occurred").

Determining the accrual date may cause considerable problems in determining whether the statute of limitations for a particular claim has run. For example, the courts still struggle with the issue of when employment discrimination claims arise under Title VII even though Title VII specifies an accrual date. See *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (holding that the date of accrual for challenging an intentionally discriminatory seniority system was the date on which the seniority plan was adopted even though the plaintiffs were not affected until years later). Section 112 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2) (Supp. 1991), legislatively overrules *Lorance* on its particular facts but leaves open the question of whether decisions extending *Lorance* to non-seniority cases survive. See also *Bazemore v. Friday*, 478 U.S. 385 (1986) (holding that a claim arose each time the plaintiff received a discriminatory paycheck); *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) (holding that the plaintiff's claim arose when she was illegally discharged, not when she was rehired without seniority); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (holding that the plaintiff's claim arose when the defendant notified the plaintiff that he had been denied tenure, not on his last day of employment). See generally James M. Fischer, *The Limits of Statutes of Limitation*, 16 SW. U. L. REV. 1, 3-8 (1986).

12. The rules governing when a cause of action commences for purposes of tolling the statute of limitations vary. In many jurisdictions filing the complaint with the court is sufficient. See, e.g., FED. R. CIV. P. 3 (providing that federal law claims are commenced for statute of limitations purposes by filing the complaint; diversity claims are governed by state law.) Some states require service of the summons, complaint, or both. See N.Y. CIV. PRAC. L. & R. 203(b)(1) (McKinney 1990); KAN. STAT. ANN. § 61-1703 (Supp. 1991). Special rules may govern particu-

The states have enacted generalized statutes of limitations.¹³ These statutes provide time-bars for common groups or categories of actions.¹⁴ For example, a state might enact a six-year limitation on actions arising under a contract¹⁵ or a three-year limitation on actions to recover damages for personal injury.¹⁶ Other state statutes provide explicit limitations periods for the rights that they create.¹⁷ Many states also have a "catch-all" or "fallback" statute of limitations for claims that do not have an explicit limitations period and do not fall within a generalized statute.¹⁸

Other factors may affect how statutes of limitations are measured. These include tolling provisions, conditions precedent to filing a claim, and provisions for borrowing other periods of limitations. The rules governing these factors are found in state legislation¹⁹ as well as case law.

Unlike the state legislatures, Congress has not enacted generalized periods of limitations for federal causes of action.²⁰ While some fed-

lar causes of action or circumstances. See, e.g., National Labor Relations Act § 10(b), 29 U.S.C. § 160(b)(1988)(requiring both filing and service of process); N.Y. CIV. PRAC. L. & R. 203(b)(5)(McKinney 1990)(providing that service on the county sheriff tolls the statute of limitations for 60 days to allow additional time for serving the defendant.)

13. All fifty states have adopted generalized statutes of limitations. Special Project, *supra* note 1, at 1015 n.13. See, e.g., N.Y. CIV. PRAC. L. & R. 211-217 (McKinney 1990 & Supp. 1993).

14. For a discussion on how generalized statutes of limitations work, see Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447, 1461-63 (1988); See generally CALVIN W. CORMAN, LIMITATION OF ACTIONS (1991).

15. See N.Y. CIV. PRAC. L. & R. 213(2)(McKinney 1990).

16. See N.Y. CIV. PRAC. L. & R. 214(5)(McKinney 1990).

17. See, e.g., N.Y. U.C.C. LAW § 2-725 (McKinney 1964)(establishing a four-year statute of limitations for breach of contract for sale of goods); 43 PA. CONS. STAT. ANN. § 959(h)(1991)(requiring a complaint under the Human Relations Act to be filed with the Pennsylvania Human Relations Commission "within one hundred and eighty days after the alleged act of discrimination").

18. See, e.g., 42 PA. CONS. STAT. ANN. § 5527 (1981 & Supp. 1993)("Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531" must be commenced within six years.); N.Y. CIV. PRAC. L. & R. 213(1)(McKinney 1990)(establishing a six-year statute of limitations for "an action for which no limitation is specifically prescribed by law"); N.M. STAT. ANN. § 37-1-4 (Miche 1990)("[A]ll other actions not herein otherwise provided for and specified [must be brought] within four years.").

19. See, e.g., N.Y. GEN. MUN. LAW §§ 50-e, 50-i (McKinney 1986)(providing that notice of a tort claim against a municipality must be given within 90 days after the claim arises.); N.Y. CIV. PRAC. L. & R. 208 (McKinney 1990)(tolling provision for infancy and insanity); N.Y. CIV. PRAC. L. & R. 204(b)(McKinney 1990)(tolling during non-mandatory arbitrations); N.Y. CIV. PRAC. L. & R. 202 (McKinney 1990)(borrowing statutes of limitations for causes of action accruing out-of-state). See generally Special Project, *supra* note 1, at 1015 n.13.

20. Some exceptions exist. Congress has adopted a five-year statute of limitations for

eral statutes have explicit time-bars for the rights they create,²¹ many do not.²² When a federal claim has no explicit limitations period, the courts must "fill in the gap" usually by borrowing an appropriate state statute of limitations.²³

Statutes of limitations are not jurisdictional in nature.²⁴ They are subject to equitable tolling and waiver. At common law statutes of limitations were considered affirmative defenses, affecting the plaintiff's remedy but not the underlying right.²⁵ The same is true for the states' general limitations provisions.²⁶ However, where a state statute creates a right and specifies a limitations period for enforcing that right, the statute of limitations may be considered a substantive condition measuring the life of the right.²⁷ The plaintiff then has the bur-

"enforcement of any civil fine, penalty, or forfeiture." 28 U.S.C. § 2462 (1988). However, the courts have interpreted this provision narrowly. Special Project, *supra* note 1, at 1023 n.65. Congress has also enacted a five-year "fall-back" statute of limitations for non-capital criminal actions. 18 U.S.C. § 3282 (1988). See also 28 U.S.C. § 2401(a)(1988) (establishing a six-year statute of limitations for nontort actions against the United States).

21. See, e.g., 15 U.S.C. § 15b (1988) (four-year statute of limitations for civil enforcement actions under the Clayton Act); 15 U.S.C. § 78p(b) (1988) (two-year statute of limitations for insider trading claims under the Securities Exchange Act); 35 U.S.C. § 286 (1988) (six-year statute of limitations for patent infringement claims); 29 U.S.C. § 160(b) (1988) (six-month statute of limitations for filing unfair labor practice charges with the National Labor Relations Board). For a compilation of federal statutes of limitations, see *Federal Statutes of Limitation*, 20 Sw. U. L. Rev. 494 (1991) (listing statutes of limitations for federal statutory causes of action and other procedural time limitations).
22. See, e.g., 18 U.S.C. § 1964 (1988) (RICO civil enforcement actions); 20 U.S.C. § 1415(e)(2) (1988) (parental challenges to administrative rulings under the All Handicapped Children Act of 1975); 29 U.S.C. § 185 (1988) (actions against employers for breach of collective bargaining agreements under the National Labor Relations Act); 29 U.S.C. §§ 411, 412 (1988) (claims under the Labor-Management Reporting and Disclosure Act of 1959 for violations of the Union Bill of Rights); 33 U.S.C. § 1365 (1988) (citizen enforcement actions under the Clean Water Act); 42 U.S.C. § 1981 (1988) (actions for discrimination in the making and enforcement of contracts); 42 U.S.C. § 1981a (Supp. 1991) (damages actions for intentional discrimination under Title VII or the Americans with Disabilities Act of 1990); 42 U.S.C. § 1983 (1988) (civil rights actions against persons acting under color of state law); 42 U.S.C. § 7604 (Supp. 1991) (citizen enforcement actions under the Clean Air Act).
23. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). The courts will occasionally borrow a federal statute of limitations if applying state law would conflict with federal law or policy. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72 (1983). In rare circumstances the court will determine that Congress intended that no limitations period apply. See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (Title VII enforcement actions brought by the EEOC); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240-44 (1985) (federal common law actions by Indians to enforce property rights).
24. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).
25. FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* 201 (4th ed. 1992).
26. *Id.*
27. *Id.* See *Kalmich v. Bruno*, 553 F.2d 549 (7th Cir.), *cert. denied*, 434 U.S. 940 (1977).

den of proving that the claim arose within the limitations period.²⁸

Federal law treats statutes of limitations as affirmative defenses.²⁹ The burden of proof is on the party asserting the defense. Under Rule 12 of the Federal Rules of Civil Procedure, a defendant³⁰ must plead a limitations defense in the answer or raise it in a Rule 12(b) motion.³¹ Otherwise, the statute of limitations defense is waived.³² When a waiver occurs, the court may, nevertheless, allow the defendant to amend his or her answer to add a limitations defense if the interests of justice would be served.³³ Usually, the court decides whether a claim is time-barred on a summary judgment motion. However, the defendant may bring a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted or a Rule 12(c) motion for judgment on the pleadings if the complaint states an accrual date which is outside the limitations period.³⁴

Certain equitable factors may affect statutes of limitations. Tolling provisions suspend the running of the limitations period.³⁵ For example, statutes of limitations are commonly suspended during the plaintiff's incapacity³⁶ or the defendant's fraudulent concealment of the plaintiff's injury or right of action.³⁷ Under these circumstances, policy dictates that the plaintiff's and society's interests in having the

28. FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* 201 (4th ed. 1992).

29. FED. R. CIV. P. 8(c) provides in part, "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . ." See 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1394 (1990)[hereinafter WRIGHT & MILLER].

30. The term "defendant" is used here for convenience and clarity. Other parties to a lawsuit may also assert a statute of limitations defense. For example, a plaintiff may assert a limitations defense to a counterclaim or crossclaim. See FED. R. CIV. P. 12(b).

31. FED. R. CIV. P. 12(b)(6). See WRIGHT & MILLER, *supra* note 29, § 1394.

32. WRIGHT & MILLER, *supra* note 29, § 1394.

33. FED. R. CIV. P. 15. See WRIGHT & MILLER, *supra* note 29, § 1394.

34. JAMES WM. MOORE, 2A MOORE'S FEDERAL PRACTICE § 12.10 (2d ed. 1992). If the court cannot determine whether the statute of limitations has run from the face of the pleadings, it may convert a Rule 12(b)(6) or 12(c) motion to a summary judgment motion. FED. R. CIV. P. 12(b),(c).

35. They may also enlarge the limitations period, provide alternate limitations periods, or restart the limitations period. Siegel, *Practice Commentary*, *supra* note 1, at 100. For a discussion of the policies underlying tolling and common circumstances which lead to tolling, see Special Project, *supra* note 1, at 1084-90; CORMAN, *supra* note 14, §§ 8.1-10.7.

36. Incapacity occurs when the plaintiff is not capable of asserting his or her claim. For example, the plaintiff's insanity, incarceration, or absence from the state may suspend the statute of limitations.

37. Fraudulent concealment occurs when the defendant prevents the plaintiff from discovering the plaintiff's injury or right of action. For a discussion of fraudulent concealment, see Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L. J. 829, 845-55 (1983); Special Project, *supra* note 1, at 1019-20.

claim heard outweigh the defendant's interest in repose and the danger of litigating a stale claim.³⁸ For federal causes of action, the Supreme Court has recognized that tolling may be appropriate where:

a claimant has received inadequate notice, . . . where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, . . . where the court has led the plaintiff to believe that she had done everything required of her, . . . [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction . . .³⁹

Tolling may also be appropriate to effectuate federal policy.⁴⁰ As a general rule, however, the courts apply statutes of limitations strictly because of the important policies they serve.⁴¹

B. The Policies Underlying Limitations Periods⁴²

Statutes of limitations "intimately affect" the plaintiff's right to recover.⁴³ Once the limitations period has run, the plaintiff loses his or her right to assert an action. Therefore, they are an integral part of the underlying claim.⁴⁴

38. Special Project, *supra* note 1, at 1085. Under the *Erie* doctrine federal courts apply state tolling provisions in diversity cases. See *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532-34 (1949) (reaffirmed by *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980)). If the federal court borrows a state statute of limitations for a federal claim, it will also apply the state's tolling provisions unless they would be inconsistent with federal law or policy. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

39. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (citations omitted).

40. See *Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) (tolling the statute of limitations under the Clayton Act during Federal Trade Commission proceedings).

41. See *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system . . .").

42. For a discussion of the policies underlying statutes of limitations, see generally Boswell, *supra* note 14, at 1463-64; *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950) [hereinafter *Developments*]; Fischer, *supra* note 11, at 1-2; Special Project, *supra* note 1, at 1014-18; CORMAN, *supra* note 14, § 1.1 at 11-17.

43. Referring to statutes of limitations in diversity cases, the Supreme Court has stated:

Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945); See also *Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980). The statute of limitations applied to a federal claim also "vitally affects" the underlying right because it determines the duration of that right. See *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147-48 (1987). See also Boswell, *supra* note 14, at 1461.

44. Statutes of limitations are considered "substantive law" for the purposes of *Erie* analysis. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). In *Erie R.R. v.*

Statutes of limitations reflect a delicate balance among the plaintiff's, defendant's, and society's interests.⁴⁵ They are designed to create predictability, uniformity, and fairness by preventing litigation of stale claims.⁴⁶ Limitations periods must be long enough to protect the

Tompkins, 304 U.S. 64 (1938), the Supreme Court held that a federal court sitting in diversity must apply the same substantive law that the forum state court would apply. Accordingly, federal courts apply state statutes of limitations to diversity claims. *Guaranty Trust Co.*, 326 U.S. 99. Because federal substantive law applies in federal question claims, courts also apply federal statutes of limitations to federal question claims. See *Holmberg v. Armbrrecht*, 327 U.S. 392, 394-95 (1946). Even when the court borrows a state limitations period for a federal question claim, the borrowed period becomes federal law. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983); *West v. Conrail*, 481 U.S. 35, 39 (1987). See also *infra* notes 83-84 and accompanying text.

The courts, however, have characterized statutes of limitations differently in some other contexts. For example, the states treat their statutes of limitations as "procedural law" for choice-of-law decisions. See *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). But see *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 415-18 (N.J. 1973). See also *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (holding that when a federal court transfers venue, the transferee court must apply the same law that the transferring court would apply.); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (applying *Van Dusen* choice-of-law rules to plaintiff-initiated transfers as well as defendant-initiated transfers). Justice Brennan has described statutes of limitations as having both substantive and procedural aspects. *Sun Oil Co.*, 486 U.S. at 736 (Brennan, J. concurring in judgment).

Because this article focuses on borrowing limitations periods for federal law claims, the problem of how statutes of limitations should be treated in conflict-of-law and venue transfer cases is beyond the scope of this article. For a discussion of this complex area, see generally Bruce Posnak, *The Court Doesn't Know Its Asahi from Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875 (1990); David E. Seidelson, 1 (Wortman) + 1 (Ferens) = 6 (Years): *That Can't Be Right-Can It?* *Statutes of Limitations and Supreme Court Inconsistency*, 57 BROOK. L. REV. 787 (1991); David H. Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287 (1960); Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 AKRON L. REV. 19 (1989); Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. REV. 681 (1989); Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683.

Regardless of how the courts designate statutes of limitations in a given context, as a practical matter, once the limitations period has run, the plaintiff loses his or her right to assert a claim. Therefore, the statute of limitations is important to the underlying legal right. See DAVID D. SIEGEL, *NEW YORK PRACTICE* 37 (2d ed. 1991) ("[T]here is little else in law that can destroy a case so quickly and from the defendant's point of view so conveniently.")

45. See Ellen E. Kaulbach, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CAL. L. REV. 133, 135 (1989).

46. See *Owens v. Okure*, 488 U.S. 235, 240 (1989) ("Predictability, a primary goal of statutes of limitations, was frustrated" by "seeking state-law analogies for particular § 1983 claims."); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-52 n.12 (1980) (holding that the requirement of actual service "does nothing to promote the general policy behind all statutes of limitations of keeping stale claims out of court.").

plaintiff's and society's interests in having the claim prosecuted. On the other hand, they must be short enough to protect the defendant, the court, and society from wasting time and resources litigating old claims.⁴⁷

Time-bars also reflect the legislature's evaluation of the underlying cause of action and the policies implicated. A short period may reflect disapproval of the underlying right, a desire to protect the defendant, or the need for prompt dispute resolution.⁴⁸ For example, actions against public officials frequently have a short statute of limitations to discourage such claims.⁴⁹ Intentional tort actions may have a short time-bar because the victim usually knows immediately what the effects of an intentional tort will be and should not "sit on" his or her claim.⁵⁰ Labor actions also tend to have a short limitations period to promote rapid resolution of labor disputes.⁵¹

To choose an appropriate limitations period, the legislature must evaluate the nature of the underlying cause of action, its policies, and society's interests in having the right asserted.⁵² Then the legislature

47. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975) ("[T]he length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.").

48. *Developments*, *supra* note 42, at 1180.

49. See *e.g.*, *Pauk v. Board of Trustees*, 654 F.2d 856, 862 (2d Cir. 1981) (stating that N.Y. GEN. MUN. LAW § 50-i, which provides a one-year statute of limitations for tort claims against municipalities, is designed "to provide more restrictive remedies against municipal employees for their torts than are available against private citizens, for whom the limitations period . . . is three years"), *cert. denied*, 455 U.S. 1000 (1982), *overruled on other grounds by* *Wilson v. Garcia*, 471 U.S. 261 (1985); N.Y. CIV. PRAC. L. & R. 215(1) (McKinney 1990) (providing a one-year limitation on actions "against a sheriff, coroner or constable, upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty, except the non-payment of money collected upon an execution").

50. See *e.g.*, *Okure v. Owens*, 816 F.2d 45, 49-50 (2d Cir. 1987) (Van Graafeiland, J., dissenting) (discussing New York's one-year statute of limitations for certain enumerated intentional torts), *aff'd*, 488 U.S. 235 (1989).

51. See *e.g.*, National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1988) (providing a six-month limitations period for filing unfair labor practice charges before the NLRB); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (1988) (requiring that an employment discrimination charge be filed with the EEOC within 180 days, or 300 days in a deferral state, of the discriminatory act). See also *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 168 (1983).

52. See *Okure v. Owens*, 816 F.2d 45, 48 (2d Cir. 1987) (reasoning that limitations must be long enough to effectuate the policy of the claim.), *aff'd*, 488 U.S. 235 (1989); *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (characterizing § 1983 claims, for limitations purposes, as tort actions for recovery of damages "is supported by the nature of the § 1983 remedy, and by the federal interest in ensuring that the borrowed period of limitations not discriminate against the federal civil rights remedy").

Society's interest in most causes of action is to protect citizens' rights and deter harmful or other undesirable conduct. Depending on the particular type of action, society will have other specific interests. For example, the legislature may

must select a reasonable time in which the plaintiff can discover, investigate, and assert his or her claim.⁵³ The legislature must also estimate how long the evidence and witnesses will be available and reliable. The time period chosen is the period after which the need for repose and avoiding stale claims outweighs the interests in enforcing the claim.⁵⁴

Statutes of limitations are designed to protect defendants by giving them repose.⁵⁵ Defendants do not have to live their entire lives fear-

want to compensate victims for their injuries and punish wrongdoers by allowing claims for compensatory and punitive damages. Some statutes give private citizens the right to sue so that they will act as "private attorneys general." Environmental protection and anti-discrimination laws often fall into this category. See generally *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (Title VII of the Civil Rights Act of 1964); *Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (Title II of the Civil Rights Act of 1964); *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1209 (1986) (Clean Water Act); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 639 F.2d 802, 804 (1981) (Clean Air Act). As "private attorneys general," plaintiffs help enforce important societal interests where government lacks either the resources or political will for comprehensive enforcement. Society has a particularly strong interest in having these claims asserted.

53. Rule 11 of the Federal Rules of Civil Procedure requires that litigants make a reasonable inquiry into the law and facts of their claims before asserting them. The attorney of record or *pro se* litigant must sign all court papers. The signature on the pleading certifies that the claim asserted is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," and not interposed for an improper reason. FED. R. CIV. P. 11. Litigants and their attorneys who violate Rule 11 are subject to sanctions. *Id.* Many states have rules similar to Rule 11 although the majority are weaker versions. See, e.g., CAL. CODE CIV. P. § 128.5; TEX. R. CIV. P. 13. Courts also have the inherent power to sanction litigants for asserting frivolous claims. See *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991). Therefore, the statute of limitations must afford litigants sufficient time to make a reasonable inquiry into both the law and the facts before commencing an action. Moreover, the Supreme Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (discussing the plaintiff's burden on summary judgment), may increase the need for pre-litigation investigation even though non-movants are entitled to reasonable discovery before the court can grant summary judgment against them.

54. In *Sun Oil Co. v. Wortman*, 486 U.S. 717, 736 (1988) (Brennan, J., concurring in judgment), Justice Brennan described statutes of limitations as a "complicated temporal balance." Stating that they could not be characterized as "purely procedural or purely substantive," he explained the balancing of interests as follows:

The statute of limitations a State enacts represents a balance between, on one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law. A State that has enacted a particular limitations period has simply determined that after that period the interest in vindicating claims becomes outweighed by the combination of the interests in repose and avoiding stale claims.

Id. See also *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975).

55. See *Agency Holding Co. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156

ing that they will be sued for past deeds. As a result, time-bars help stabilize commercial and property transactions.⁵⁶ With a known period of liability, defendants can arrange their personal and commercial lives accordingly. They can also collect and preserve evidence against the possibility of suit while the evidence is fresh. Moreover, time-bars protect defendants from unfair surprise and the prejudice of having to defend themselves years after the claim arose when the evidence and witnesses may be scarce or lost.⁵⁷ Statutes of limitations thus force plaintiffs to assert their claims in a timely fashion when the evidence and witnesses' memories are fresh.⁵⁸

Periods of limitations also assist the courts, and thus society, by preserving resources and promoting the legitimacy of the judicial process.⁵⁹ They play a major role in reducing the courts' crowded dockets by deterring litigants from filing most time-barred claims. Untimely claims that are filed can usually be dismissed in a pretrial motion. As a result, the courts do not have to waste valuable time and resources litigating stale claims.

More importantly, statutes of limitations promote accuracy and fairness.⁶⁰ Through time-bars the courts avoid dealing with unreliable witnesses and stale, or even false, evidence. Discussing the policies underlying statutes of limitations, the Supreme Court has said:

A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.⁶¹

(1987)(quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985))(" '[E]ven wrongdoers are entitled to assume that their sins may be forgotten.' "); *Wilson v. Garcia*, 471 U.S. 261, 275 n.34 (1985)("Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."); *id.* at 282 (O'Connor, J., dissenting)(" [A] legislature's selection of differing limitations periods for a claim sounding in defamation and one based on a written contract is grounded in its evaluation of the characteristics of those claims relevant to the realistic life expectancy of the evidence and the adversary's reasonable expectations of repose."). See also Special Project, *supra* note 1, at 1017-18.

56. *Developments*, *supra* note 42, at 1185-86; Special Project, *supra* note 1, at 1016.

57. See *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

58. See *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980)("The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh.").

59. Special Project, *supra* note 1, at 1016-17.

60. See *id.*

61. *Agency Holding Co. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987)(citation omitted)(quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)). See also *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980)(" [I]n the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred with-

Finally, to the extent that the public perceives that time-bars prevent frivolous claims and promote accuracy, they also help preserve the public's perception of the courts' legitimacy.

To effectuate these policies, statutes of limitations must be easy to identify and apply.⁶² They should also be applied fairly to protect litigants' rights. Unfortunately, the practice of borrowing periods of limitations for federal causes of action is complex, confusing, and often inequitable. Moreover, the period borrowed is seldom well-tailored to the underlying claim because Congress has not engaged in the necessary balancing of interests.

III. PROBLEMS WITH BORROWING ANALOGOUS STATUTES OF LIMITATIONS

If the state or federal statute contains an express statute of limitations for the cause of action it creates, determining what limitations period to apply is not a problem. The time period specified in the statute applies.⁶³ When a state statute does not contain a limitations period, the state's generalized statutes of limitations will usually supply one.⁶⁴ Unlike the states, however, Congress has not enacted limitations periods for general categories of federal claims,⁶⁵ and until recently, no general "fallback" statute of limitations existed. Instead, Congress has relied on the courts to supply time-bars where it has failed to do so.

Determining appropriate limitations periods for federal claims has become a significant problem. Over the years Congress has created numerous causes of action without statutes of limitations.⁶⁶ Moreover, the courts have recognized implied rights of action arising under

out respect to whether it is meritorious."); *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828)(Story, J.)("It is a wise and beneficial law . . . to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.").

62. See *Wilson v. Garcia*, 471 U.S. 261, 266 (1985)(quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983)(Rehnquist, J., dissenting))("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.").

63. See generally *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946)("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter.").

64. See *supra* text accompanying notes 13-18.

65. But see *supra* note 20.

66. See *Reed v. United Transp. Union*, 488 U.S. 319, 323 (1989)("Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action."); *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980)(noting that Congress' failure to enact a specific statute of limitations is "a void which is commonplace in federal statutory law"). For some examples of federal statutory causes of action without express limitations periods, see *supra* note 22.

federal legislation⁶⁷ and even a few federal common law actions.⁶⁸ No explicit limitations provisions exist for these causes of action.

A. Borrowing State Law

When a federal claim has no express limitations period, the courts do not assume that the claim lasts indefinitely.⁶⁹ Rather, they "fill in the gap" by supplying a time-bar.⁷⁰ However, the Supreme Court has recognized that the judiciary is not the appropriate body to create periods of limitations.⁷¹ As discussed in Part II above, statutes of limitations require a delicate balancing of interests.⁷² They are also arbitrary by nature, at least to some extent.⁷³ As political branches of government accountable to the public, legislatures are better equipped than the federal judiciary to do the appropriate balancing and to select a time limit.⁷⁴ Accordingly, judges have refused to fashion periods of

67. *See, e.g.,* Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)(finding an implied right of action for securities fraud under § 10(b) of the Securities Exchange Act of 1934); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)(finding an implied right of action for damages under the Commodities Futures Trading Commission Act); Cannon v. University of Chicago, 441 U.S. 677 (1979)(finding an implied right of action for sex discrimination under Title IX of the Education Amendments of 1972); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979)(finding an implied private right of action for rescission under § 215 of the Investment Advisers Act of 1940); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971)(finding an implied right of action for Constitutional violations by federal officials); Vaca v. Sipes, 386 U.S. 171 (1967)(finding an implied right of action for breach of the union's duty of fair representation under § 301 of the Labor Management Relations Act); J.I. Case Co. v. Borak, 377 U.S. 426 (1964)(finding an implied right of action by shareholders for damages for violation of § 14(a) of the Securities Exchange Act of 1934).

68. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)(recognizing a federal common law right of ejectment to enforce Indian property rights).

This article treats causes of action which arise under federal common law as distinct from actions implied under federal legislation or the Constitution. Although both are considered "federal common law," the former derives from non-statutory sources. *See id.*; Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805, 832-33 (1989). Implied actions involve filling in statutory "gaps" and derive from the court's role in interpreting statutes. *See generally* Boswell, *supra* note 14, at 1452-53.

69. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983).

70. *See id.* at 158-59. The federal courts' power to "fill in the gaps" necessary in interpreting federal legislation derives from the courts' power to decide cases and controversies under Article III of the Constitution. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Boswell, *supra* note 14, at 1449 & n.12.

71. *See* *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 698 (1966).

72. *See supra* text accompanying notes 45-62.

73. Weinberg, *supra* note 44, at 686.

74. *See* *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 169 (1987)(Scalia, J., concurring in judgment)(asserting that examining the underlying policies of a federal cause of action to determine whether those policies are better served by borrowing a federal or state statute of limitations is "quintessen-

limitations without legislative guidance. To do otherwise would constitute a "drastic sort of judicial legislation."⁷⁵ Instead, they borrow the forum state's most analogous statute of limitations unless it conflicts with federal law or policy.⁷⁶ When a conflict occurs, the courts usually select the most analogous federal statute of limitations.⁷⁷

In the absence of Congressional legislation, borrowing a limitations period makes sense. It avoids judicial legislating and helps to effectuate the policies that time-bars serve. Although the state legislature may not have considered the federal right at issue,⁷⁸ it will have done at least some interest balancing. The closer the analogy between the federal right of action and the state right underlying the borrowed limitations period, the more appropriate the balancing.⁷⁹

Borrowing state time-bars for federal claims also creates greater intrastate predictability and uniformity than if the federal courts were free to fashion their own limitations periods. Theoretically at least, all of the courts within the same state, including a multi-district state, will choose the same limitations period for a given federal action. Litigants and judges need only look to the state's law to determine the correct time-period. Litigants can also expect that the same state limitations period will govern similar federal and state claims arising out of the same transaction or occurrence.⁸⁰ Unfortunately, borrowing seldom works as well in practice as it does in theory.⁸¹ In addition,

tially the kind of judgment to be made by a legislature"); NYSBA REPORT, *supra* note 1, at 1 ("essentially legislative task"); Special Project, *supra* note 1, at 1044 ("[T]he very arbitrariness of statutes of limitations argues against judicial rulemaking. It is better left to the legislatures; whenever judges engage in this type of line-drawing, a chorus of criticism generally follows.").

75. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966).

76. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).

77. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147-48 (1987). *But see* *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

78. *See* *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977).

79. The Supreme Court has explained:

By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action. However, when the federal claim differs from the state cause of action in fundamental respects, the State's choice of a specific period of limitation is, at best, only a rough approximation of "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

Wilson v. Garcia, 471 U.S. 261, 271 (1985)(citation omitted).

80. *See* *Marcus*, Memorandum, *supra* note 1, at 12-13. For example, an employee who has been fired because of race discrimination might assert a claim under 42 U.S.C. § 1981 and a supplemental tort claim for wrongful discharge in the same suit. Applying the state's personal injury statute of limitations to both the § 1983 and tort claims simplifies the litigation and avoids potential surprise to the parties.

81. *See* *Marcus*, Memorandum, *supra* note 1, at 13; *infra* text accompanying notes

borrowing fails to promote interstate predictability and uniformity because each state has its own statutes of limitations.⁸²

When the federal courts borrow a state time-bar for a federal claim, they convert the time period to federal law. In doing so, they fashion federal common law.⁸³ Under the Supremacy Clause⁸⁴ that period then becomes applicable to the state courts when adjudicating the same federal claim.

The courts are neither legislatively nor constitutionally required to borrow state law when a federal claim has no explicit statute of limitations.⁸⁵ Early cases interpreted the Rules of Decision Act⁸⁶ as requiring the federal courts to apply the states' limitations periods to federal claims when Congress was silent.⁸⁷ However, the Supreme Court subsequently rejected that interpretation.⁸⁸ Today, the courts borrow

104-40. For example, the federal court would apply two different limitations periods if the employee in the preceding footnote asserted a supplemental claim for breach of contract with her § 1981 claim. The state's general personal injury statute of limitations would still govern her § 1981 claim even though the state's limitations period for breach of contract would govern her supplemental claim. See *Goodman v. Lukens Steel Co.*, 107 U.S. 2617 (1987).

82. See *infra* notes 126-29 and accompanying text.

83. See *Wilson v. Garcia*, 471 U.S. 261, 269 (1985) (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969)) ("Even when principles of state law are borrowed to assist in the enforcement of this federal remedy, the state rule is adopted as 'a federal rule responsive to the need whenever a federal right is impaired.'"); *Board of County Comm'rs v. United States*, 308 U.S. 343, 351-52 (1939) ("[S]tate law has been absorbed . . . as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy."); *Boswell*, *supra* note 14, at 1451-56; *Special Project*, *supra* note 1, at 1029. But see *Agency Holding Co. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 158-64 (1987) (Scalia, J., concurring in judgment) (arguing that state law applies of its own force unless pre-empted by federal law).

84. U.S. CONST. art. VI.

85. But see *Owens v. Okure*, 488 U.S. 235, 239 (1989) (interpreting 42 U.S.C. § 1988 to require the courts to borrow state statutes of limitations for civil rights claims with no express limitations periods).

For a history of borrowing state statutes of limitations for federal legislation without explicit time bars, see *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 158-61 (1987) (Scalia, J., concurring in judgment); *Special project*, *supra* note 1, at 1024-42; *Kaulbach*, *supra* note 45, at 136-38.

86. The Rules of Decision Act currently provides: The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C. § 1652 (1988).

87. See *Campbell v. Haverhill*, 155 U.S. 610, 614-16 (1895); *McClaine v. Rankin*, 197 U.S. 154, 158 (1905).

88. In *DelCostello* the Supreme Court stated:

Since *Erie*, no decision of this Court has held or suggested that the (Rules of Decision) Act requires borrowing state law to fill gaps in federal substantive statutes. Of course, we have continued since *Erie* to ap-

state statutes of limitations for federal claims based on Congress' acquiescence in the courts' prior practice of borrowing state time-bars. The courts assume, absent contrary indication, that Congress intends for them to borrow state law when an explicit time-bar is not provided.⁸⁹

1. *Choosing the Most Analogous State Statute of Limitations*

In order to determine which state statute of limitations to borrow, the court must analyze both the federal right and the state's various causes of action.⁹⁰ From this analysis, the court must decide which state right is most analogous to the federal right and then determine which state statute of limitations applies to that state right. Federal law governs how the federal claim is characterized.⁹¹ The court may consider how the state would characterize the federal right provided the state's characterization does not conflict with federal policy.⁹²

ply state limitations periods to many federal causes of action; but we made clear in *Holmberg v. Armbricht*, 327 U.S. 392, 394-395 (1946), that we do so as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act or the *Erie* doctrine requires it.

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983). *But see id.* at 172-74 (Stevens, J., dissenting)(arguing that the Rules of Decision Act requires the courts to borrow state limitations periods); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989)(arguing that the Rules of Decision Act should be construed to preclude all substantive federal common law).

89. The Supreme Court explained:

In some instances, of course, there may be some direct indication in the legislative history suggesting that Congress did in fact intend that state statutes should apply. More often, however, Congress has not given any express consideration to the problem. In such cases, the general preference for borrowing state limitations periods could more aptly be called a sort of fallback rule of thumb than a matter of ascertaining legislative intent; it rests on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions.

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158 n.12 (1983). *See also* *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987)("Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law.").

90. Kaulbach, *supra* note 45, at 138-39. *See* *Wilson v. Garcia*, 471 U.S. 261, 276-79 (1985)(comparing § 1983 claims with various state causes of action).

91. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987)(citing *Wilson v. Garcia*, 471 U.S. 261, 269-70 (1985))("The characterization of a federal claim for purposes of selecting the appropriate statute of limitations is generally a question of federal law . . ."). However, Congress can dictate that the state's characterization be used. *See* *Federal Torts Claims Act*, 28 U.S.C. § 2674 (1988).

92. *See* *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966).

However, the state's characterization is not binding.⁹³

There are a number of ways in which a court may characterize a federal claim and analogize it to a state right. The court may compare the legal theories involved, the elements of the causes of action, the remedies sought, the type of injuries, and the particular facts of the pending case.⁹⁴ The court may also examine the policies underlying the federal right and choose the state law which best reflects those policies.⁹⁵ Depending on the court's approach, a federal cause of action may be characterized on a case-by-case basis or all federal claims arising under a particular statutory provision may be given one general characterization.⁹⁶

The Supreme Court has provided little practical guidance as to how the analysis should be done. However, the cases suggest a three-part inquiry.⁹⁷ The first step is to decide whether the federal right of action requires a uniform characterization. The Supreme Court has stated that "[t]he initial inquiry is whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.'"⁹⁸ The court is more likely to adopt a uniform characterization when different types of claims can be asserted under the same statutory provision and there is a strong public interest in having the claim asserted.⁹⁹ Case-by-case analogy of such claims would thwart public policy by generating "uncertainty and time-consuming litigation."¹⁰⁰

93. *Id.*

94. Kaulbach, *supra* note 45, at 138-39; Special Project, *supra* note 1, at 1066.

95. See Special Project, *supra* note 1, at 1066-67.

96. See, e.g., *Wilson v. Garcia*, 471 U.S. 261 (1985) (characterizing all claims under 42 U.S.C. § 1983 as personal injury claims for statute of limitations purposes).

97. See *id.* at 268; *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2779 (1991) (plurality opinion). See generally *Reed v. United Transp. Union*, 488 U.S. 319, 325-35 (1989).

98. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987) (quoting *Wilson v. Garcia*, 471 U.S. 261, 268 (1985)).

99. See, e.g., *Reed v. United Transp. Union*, 488 U.S. 319, 325 (1989) (claims against unions for violations of their members' rights of free speech and assembly under the Labor-Management Reporting and Disclosure Act); *Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (§ 1983 claims); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2778 (1991) (implied claims under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 149-50 (1987) (private enforcement claims under RICO).

100. *Wilson v. Garcia*, 471 U.S. 261, 272 (1985). The plurality in *Gilbertson* explained: Where a federal cause of action tends in practice to "encompass numerous and diverse topics and subtopics," . . . such that a single state limitations period may not be consistently applied within a jurisdiction, we have concluded that the federal interests in predictability and judicial economy counsel the adoption of one source, or class of sources, for borrowing purposes.

The second step is to decide whether state or federal law should supply the limitations period.¹⁰¹ In most cases state law will apply.¹⁰² The final step is to "characterize the essence of the claim in the pending case and decide which state statute provides the most appropriate limiting principle."¹⁰³

2. Problems with Borrowing State Statutes of Limitations

On its face, borrowing appears to be a relatively attractive solution. Too often, however, no clear match exists. More than one state limitations period may be applicable, or none may be particularly analogous.¹⁰⁴ Unless a higher, binding court has already decided the issue, the litigants and judge must spend time and resources characterizing the federal claim and then analogizing it to the forum state's various causes of action and statutes of limitations.¹⁰⁵ The search is often difficult. The most analogous statute of limitations may not be found in the state's generalized limitations periods, but in a specific state statute. As one practice manual warns the practitioner, "No general list can be relied upon and the only safe course is to carefully research

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2779 (1991)(citation omitted).

For example, § 1983 civil rights claims may resemble a variety of state actions including different common law and statutory tort actions, state actions against public officials, and claims for rights created by statute. *Wilson v. Garcia*, 471 U.S. 261, 272-73 (1985). Section 1983 embodies a strong public interest in vindicating federal civil rights. The Supreme Court found that uncertainty and peripheral litigation would undermine this policy if each § 1983 claim were characterized separately for borrowing a limitations period. In *Wilson*, the Court concluded that all § 1983 claims should be characterized as personal injury claims. *Id.* at 276. The Supreme Court subsequently narrowed its characterization. In *Owens v. Okure*, 488 U.S. 235 (1989), the Court directed courts to borrow the states' general personal injury or residual personal injury statutes of limitations for all § 1983 claims. For a discussion of the problems with borrowing state limitations periods for § 1983 claims see *infra* text accompanying notes 141-99.

101. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987). For a discussion on borrowing federal statutes of limitations, see *infra* notes 216-40 and accompanying text.
102. See *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989)(warning that borrowing a federal statute of limitations is a "closely circumscribed exception to the general rule that statutes of limitation are to be borrowed from state law").
103. *Wilson v. Garcia*, 471 U.S. 261, 268 (1985). See also *Reed v. United Transp. Union*, 488 U.S. 319, 325-27 (1989).
104. Siegel, *Practice Commentary*, *supra* note 1, at 98-99.
105. The question of which limitations period to borrow remains unsettled until the Supreme Court ultimately decides the question. Even in circuits where the courts have applied the same statute of limitations for years, a Supreme Court ruling can upset settled expectations. See *Lampf, Pleva, Lipkin, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, (1991)(upsetting over 30 years' precedents in the Ninth Circuit); Siegel, *Practice Commentary*, *supra* note 1, at 98 ("[T]he guessing isn't over until the highest court that the case can be (and is) taken to decides the point.").

each potential claim before concluding that no 'special' limitations period protects the likely defendant."¹⁰⁶

The limitations period applied to a federal right usually varies from state to state because courts characterize claims differently.¹⁰⁷ Moreover, each state has enacted its own limitations statutes. When a state has more than one analogous statute of limitations, the limitations period applied to a federal right may vary within the same state or even from judge to judge within the same judicial district.¹⁰⁸ As a result, borrowing creates confusion, unpredictability, and a lack of uniformity.¹⁰⁹

The uncertainty and confusion, in turn, generate wasteful litigation.¹¹⁰ Because the court will never hear the merits of a time-barred claim, litigants try to characterize claims so that the court will borrow the statute of limitations which is most advantageous for their side.¹¹¹ As a result, trial courts are forced to spend time litigating limitations disputes before they can reach the merits. Uncertainty also encourages appeals because of the important consequences to the litigants.¹¹² The Supreme Court's discussion of the problems which borrowing generated in civil rights cases before *Wilson v. Garcia*¹¹³ and *Owens v. Okure*¹¹⁴ is equally applicable to other areas where borrowing has created uncertainty:

[T]he legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matter.

On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.¹¹⁵

Borrowing state time-bars also encourages forum shopping.¹¹⁶ If the federal claim can be brought in more than one state, plaintiffs will search for the state with the longest limitations period when timing is a problem.¹¹⁷ Unless the forum state has a borrowing law, which can

106. OSCAR G. CHASE ET AL., WEINSTEIN, KORN AND MILLER CPLR MANUAL § 2.03, at 2-5 (2d ed. 1980).

107. Marcus, Memorandum, *supra* note 1, at 1.

108. NYSBA REPORT, *supra* note 1, at 1-2.

109. *Id.* at 1.

110. Marcus, Memorandum, *supra* note 1, at 5; Siegel, *Practice Commentary*, *supra* note 1, at 99.

111. Special Project, *supra* note 1, at 1075.

112. *Id.*

113. 471 U.S. 261 (1985).

114. 488 U.S. 235 (1989).

115. *Wilson v. Garcia*, 471 U.S. 261, 275 & n.34 (1985).

116. Marcus, Memorandum, *supra* note 1, at 8-9; NYSBA REPORT, *supra* note 1, at 2.

117. Even if the case is transferred to a more appropriate venue, the limitations period

create its own problems,¹¹⁸ the statute of limitations applied may have no connection with the events underlying the claim.

Borrowing state time-bars poses special problems in complex litigation. In a case with multiple claimants and related claims arising in different states, more than one state's statute of limitations may apply. Trying to determine what state time-bars apply further complicates an already complex action and may impair settlement negotiations.¹¹⁹ Multiple time-bars also discourage consolidating claims that could be tried together as class actions.¹²⁰

Borrowing may also encourage judicial abuse.¹²¹ A judge may be tempted to borrow a short limitations period to avoid reaching the merits of a claim he or she does not want to consider.¹²² Real or not, the perception of arbitrary borrowing, together with the time spent litigating limitations issues and reversals on appeal, impairs the courts' credibility.¹²³

In addition to these practical problems, borrowing state time-bars for federal claims raises serious equitable concerns. The state legislatures do not consider the federal interests at issue when they adopt a statute of limitations for a particular state right or category of state rights.¹²⁴ Accordingly, the litigants' interests in the federal right, as well as society's interest in having that right asserted, are not part of the state's balancing process. They are considered indirectly, if at all, in the federal court's process of selecting the most analogous state statute of limitations.¹²⁵

More importantly, borrowing state time-bars leads to the inequitable administration of federal rights. One of the main reasons for enacting a federal law, rather than leaving the problem to the states, is the need for uniformity.¹²⁶ When the courts borrow state limitations

of the state in which the suit was originally filed will apply. See *Ferens v. John Deere Co.* 494 U.S. 516 (1990).

118. See *Duke v. Housen*, 589 P.2d 334 (Wyo.), *cert. denied*, 444 U.S. 863 (1979).

119. Marcus, Memorandum, *supra* note 1, at 10.

120. *Id.*

121. Special Project, *supra* note 1, at 1076-77.

122. *Id.* at 1077.

123. See generally *Wilson v. Garcia*, 471 U.S. 261, 272 n.24 (1985) ("[T]he adoption of one analogy rather than another will often be somewhat arbitrary; in such a case, the losing party may 'infer that the choice of a limitations period in his case was result oriented, thereby undermining his belief that he has been dealt with fairly.'").

124. See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977); NYSBA REPORT, *supra* note 1, at 2.

125. See *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1393-94 (7th Cir. 1990) (Posner, J., concurring), *cert. denied*, 111 S. Ct. 2887 (1991). For an example of the type of legislative policy analysis which borrowing forces judges to undertake, see *infra* text accompanying notes 163-70.

126. See Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal*

periods for federal claims, federal rights vary from state to state because each state has its own statutes of limitations. For example, in a judicial district where the court has borrowed a one-year statute of limitations, a potential plaintiff will lose his or her right of recovery if he or she does not commence the action within one year. However, in a district where the court has borrowed a three-year statute of limitations for the same federal right, a person retains his or her right to bring suit for two additional years. Defendants' interests are similarly affected. In the former district a potential defendant escapes liability after only one year, but in the latter he or she is liable for three years. The differences in time periods are often quite significant.¹²⁷

Discussing the application of state limitations in diversity claims, the Supreme Court has said, "We cannot give [the action] longer life in the federal court than it would have had in the state court without adding something to the cause of action."¹²⁸ The same is true when the courts apply different limitations periods to similar federal claims in different states. Even if the courts characterize the federal claim in the same way, the court that borrows a longer limitations period "adds something" to the federal claim; the court that borrows a shorter limitations period "takes something away."¹²⁹ Plaintiffs are thereby denied equal opportunity to remedy violations of their federal rights. The borrowing process thus constitutes judicial legislation which raises both separation of powers and due process concerns.

Moreover, judicial decisions establishing new periods of limitations

Courts, 1990 B.Y.U. L. REV. 67, 83-84. Discussing federal question jurisdiction, the authors state:

The primary reason for adding this [federal question] jurisdiction in 1875 is said to have been the desire for uniformity in the interpretation and application of federal law. The underlying premise is that because the Constitution, treaties, and statutes of the United States apply to the entire country, they should have essentially the same meaning in all parts of the country.

Id.

127. The limitation period for federal claims which borrow a state's general personal injury statute of limitations varies from one to six years. Compare LA. CIV. CODE ANN. art. 3492 (West 1992 Supp.) (one year) with N.D. CENT. CODE § 28-01-16(5) (1991) (six years). These include civil rights claims under 42 U.S.C. §§ 1981, 1983, and 1985; *Bivens* constitutional claims; and claims under the Labor-Management Reporting and Disclosure Act for violations of union members' rights of free speech and assembly. See also Drew G. Peel, *Time to Learn: Borrowing a Limitations Period for Actions Arising under Section 1415(e)(2) of the Education for All Handicapped Children Act of 1975*, 1991 U. CHI. L. REV. 315, 324 & n.61 (stating that the limitations period applied to court actions challenging administrative rulings on "individualized education programs" under EAHCA has varied from 30 days to six years).
128. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 746 (1980) (quoting *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949)).
129. See Siegel, *Practice Commentary*, *supra* note 1, at 99 ("The time one has to sue on a claim is wedded substantively to the claim itself")

are applied retroactively.¹³⁰ Once the court announces a new limitations period, that period applies to the litigants in the case announcing the new rule and anyone else with a pending or potential claim. Unsuspecting plaintiffs, relying on established precedents, may find their claims time-barred while potential defendants may suddenly be subject to liability on claims they thought long since stale.

The problem of unfair surprise is dramatically demonstrated in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.¹³¹ For more than thirty years the Ninth Circuit applied the state's fraud statute of limitations and tolling law to implied actions for securities fraud under section 10(b) of the 1934 Securities Exchange Act¹³² and SEC Rule 10b-5.¹³³ Nevertheless, the Supreme Court adopted the statute of limitations in section 9(e) of the 1934 Securities Exchange Act.¹³⁴ The Court held that 10(b) actions must be commenced within one year after discovering the facts constituting a violation and within three years of the violation.¹³⁵ The Court also held that the three-year period of repose was not subject to tolling.¹³⁶ Over the strong dissent of Justices O'Connor and Kennedy,¹³⁷ the Supreme Court applied the one-and-three-year limitations period retroactively.¹³⁸ In spite of what appeared to be settled law in the Ninth Circuit, the plaintiffs in *Gilbertson* found themselves time-barred four and one-half years after commencing their action.¹³⁹ Justice O'Connor notes in her dissent that the plaintiffs were barred from the courthouse simply because "they were unable to predict the future."¹⁴⁰

130. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782 (1991); *id.* at 2785-88 (O'Connor, J., dissenting); *DeCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983) (applying a new statute of limitations retroactively to the parties without comment); *Welch v. Cadre Capital*, 946 F.2d 185 (2d Cir. 1991), *on remand from* *Northwest Sav. Bank v. Welch*, 111 S. Ct. 2882 (1991); *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420 (10th Cir. 1991); *Bank of Denver v. Southeastern Capital Group, Inc.*, 770 F. Supp. 595 (D. Colo. 1991). See generally *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991).

131. 111 S. Ct. 2773 (1991).

132. 15 U.S.C. § 78j(b) (1988).

133. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2785 (1991) (O'Connor, J., dissenting).

134. *Id.* at 2782.

135. *Id.*

136. *Id.*

137. *Id.* at 2785-88 (O'Connor, J., dissenting).

138. *Id.* at 2782.

139. *Id.* at 2786 (O'Connor, J., dissenting).

140. *Id.* Congress has tried to legislatively overrule the retroactive effect of *Gilbertson*. 15 U.S.C. § 78aa-1 (Supp. 1992). At the time of this writing, the courts are split over whether this provision is constitutional. See *TGX Corp. v. Simmons*, 786 F. Supp. 587 (E.D. La. 1992) (holding that section 27A violates the separation of powers doctrine.); *Bank of Denver v. Southeastern Capital Group, Inc.*, 789 F. Supp. 1092 (D. Colo. 1992) (holding that section 27A violates the separation of powers doctrine.); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir.

The current system of borrowing limitations periods for federal claims thus creates both practical and equitable problems. Uncertainty and the lack of uniformity force litigants and courts to expend scarce resources searching for the most analogous statute of limitations and litigating limitations issues. Borrowing also encourages forum shopping and may further complicate complex litigation. More importantly, borrowing unfairly impairs litigants' federal rights and undermines the courts' legitimacy.

3. 42 U.S.C. § 1983 Claims As An Example

The history of civil rights litigation under 42 U.S.C. § 1983 in New York State illustrates the problems that borrowing state time-bars can create. Section 1983 provides a cause of action against persons acting under color of state law for deprivation of federal rights.¹⁴¹ This statute is the primary means by which individuals can obtain relief against local governments and state and local officials for violating their constitutional and other federally protected rights.¹⁴²

1992)(holding that section 27A does not violate the separation of powers doctrine); *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992)(holding that section 27A does not violate the separation of powers doctrine); *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F. Supp. 476 (S.D.N.Y. 1992)(holding that section 27A does not violate the separation of powers doctrine.); *Brown v. Hutton Group*, 795 F. Supp. 1307 (S.D.N.Y. 1992)(holding that Section 27A does not violate the separation of powers doctrine.).

141. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

142. Congress originally enacted what is now 42 U.S.C. § 1983 as part of the civil rights legislation to control violence in the South after the Civil War. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). It was designed to "interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)(citation omitted).

Section 1983 allows suits against government employees and agents who violate federal law while acting in their official capacity, whether or not they are acting pursuant to official state custom or policy. *Monroe v. Pape*, 365 U.S. 167, 184 (1961). The Supreme Court has held that local governments and units, including municipalities and local police departments, are "persons" within the meaning of § 1983. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). They may be held liable for injuries caused pursuant to their official customs and policies. However, they are not vicariously liable under § 1983 for

Because § 1983 does not have an express statute of limitations, the courts must borrow the most analogous state limitations period for § 1983 claims.¹⁴³ Prior to *Wilson v. Garcia*,¹⁴⁴ the courts took several approaches. Some characterized § 1983 claims uniformly and borrowed one of the state's common law rights or residual time-bars.¹⁴⁵ Others applied a limitations period for a specific statutory right.¹⁴⁶ Still others characterized each action on a case-by-case basis, borrowing the limitations provision that was most analogous to the facts of the particular case.¹⁴⁷

New York had a number of limitations statutes which could apply to § 1983 actions. These included a six-year residual statute of limitations,¹⁴⁸ a three-year period for personal injury claims,¹⁴⁹ a three-year period to recover upon liability created by statute,¹⁵⁰ a one-year plus 90-day period for actions against a municipality or its employees,¹⁵¹ a one-year period for certain enumerated intentional torts,¹⁵² and a four-month period for review of administrative actions under Article 78 of the New York Civil Practice Law and Rules (hereinafter CPLR).¹⁵³ Other time-bars were also possible analogs depending on the facts of the particular case.¹⁵⁴

When the problem of which statute of limitations the courts should borrow for § 1983 claims arose in New York, the issue was strongly contested. Defendants argued that the courts should adopt the one-year-and-ninety-day limitations period for actions against municipalities or the four-month period for Article 78 proceedings. Plaintiffs ar-

their employees' individual acts. *Id.* at 691. The states and their agencies have Eleventh Amendment immunity from suit under § 1983. *Quern v. Jordan*, 440 U.S. 332 (1979) (holding that states may not be sued in federal court under § 1983); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (holding that states are not "persons" under § 1983 and cannot be sued in state court under that section without their consent). However, state officers can still be sued under § 1983 for prospective relief. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex Parte Young*, 209 U.S. 123 (1908). As a result, plaintiffs can obtain injunctive relief ordering state officials to comply with federal law.

143. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980).

144. 471 U.S. 261 (1985).

145. *See Garcia v. Wilson*, 731 F.2d 640, 643-48, 650-51 (10th Cir. 1984) (en banc), *aff'd*, 471 U.S. 261 (1985). *See also Wilson v. Garcia*, 471 U.S. 261, 275 n.35 (1985).

146. *See Pauk v. Board of Trustees*, 654 F.2d 856 (2d Cir. 1981) (borrowing New York's limitations period for actions to recover upon liability created by statute), *cert. denied*, 455 U.S. 1000 (1982), *overruled by Wilson v. Garcia*, 471 U.S. 261 (1985).

147. *See Owens v. Okure*, 488 U.S. 235, 240 (1989).

148. N.Y. CIV. PRAC. L. & R. 213(1) (McKinney 1990).

149. N.Y. CIV. PRAC. L. & R. 214(5) (McKinney 1990).

150. N.Y. CIV. PRAC. L. & R. 214(2) (McKinney 1990).

151. N.Y. GEN. MUN. LAW §§ 50-e, 50-i (McKinney 1986).

152. N.Y. CIV. PRAC. L. & R. 215(3) (McKinney 1990).

153. N.Y. CIV. PRAC. L. & R. 217 (McKinney 1990).

154. *See N.Y. CIV. PRAC. L. & R. 214-a* (two years plus six months for medical malpractice claims), 213(2) (six years for contract claims) (McKinney 1990).

gued for the various longer periods. The United States Court of Appeals for the Second Circuit finally resolved the dispute in *Pauk v. Board of Trustees*.¹⁵⁵ The Second Circuit held that CPLR 214(2), which provides a three-year limitation for recovery upon a liability conferred by statute,¹⁵⁶ should apply to all § 1983 claims in New York.¹⁵⁷

The issue remained settled for less than three years. In 1985, the United States Supreme Court decided *Wilson v. Garcia*.¹⁵⁸ The Supreme Court held that § 1983 actions should be characterized uniformly as personal injury actions for determining the most analogous

155. 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), *overruled by* *Wilson v. Garcia*, 471 U.S. 261 (1985).

156. N.Y. CIV. PRAC. L. & R. 214 (McKinney 1990) provides, "The following actions must be commenced within three years: . . . an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215"

157. *Pauk v. Board of Trustees*, 654 F.2d 856, 866 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), *overruled by* *Wilson v. Garcia*, 471 U.S. 261 (1985). The Second Circuit had previously applied CPLR 214(2) to § 1983 claims. In *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979), the Supreme Court held that § 1983 does not create substantive rights. *Chapman* forced the Second Circuit to re-examine the application of CPLR 214(2) to § 1983 actions because CPLR 214(2) does not apply to actions based on statutes that do not create new obligations. In the first cases following *Chapman*, the Second Circuit refused to borrow the one-year, ninety-day statute for actions against municipalities in favor of either CPLR 214(2) or the six-year residual limitations period. *Taylor v. Mayone*, 626 F.2d 247 (2d Cir. 1980); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980). See *Pauk*, 654 F.2d at 861-62. In *Pauk* the Second Circuit finally adopted the three-year period of CPLR 214(2) for all § 1983 actions. *Id.* at 866.

The plaintiff in *Pauk* was an assistant professor at Queens College, City University of New York. He alleged that the college and city education officials violated his First Amendment rights by denying him tenure and discharging him for his union activities. *Id.* at 858-59. *Pauk* filed his complaint three years and nine months after he received notice of the college's decision. *Id.* at 859.

In determining whether the action was time-barred, the Second Circuit noted "the inexact fit of any of New York's statutes of limitations to § 1983 actions." *Id.* at 861-62. The court also emphasized the need for uniformity in choosing a limitations period. *Id.* at 862, 863. The Second Circuit rejected the defendants' arguments for the one-year, ninety-day limitations under the General Municipal Law or the four-month limitations for Article 78 proceedings because such short periods would be inconsistent with the policies of § 1983. *Id.* at 862-63. The court also rejected the plaintiff's argument for adopting the six-year period for contract actions or the six-year residual statute of limitations. *Id.* at 863-64. Instead, the court found that CPLR 214(2) remained the most analogous statute of limitations for § 1983 claims because § 1983 provided more than an "additional remedy," or alternatively, the Constitution could be considered a statute conferring liability within the meaning of CPLR 214(2). *Id.* at 864-65. The Second Circuit, however, emphasized that "[i]t would be preferable if Congress would end the uncertainty that still exists in several states by legislating a uniform federal statute of limitations." *Id.* at 866.

158. 471 U.S. 261 (1985).

state statute of limitations.¹⁵⁹ *Wilson* thus overruled *Pauk*.

Unfortunately, New York, like many states, had more than one personal injury statute of limitations. CPLR 215(3) provided a one-year time-bar on certain enumerated intentional torts,¹⁶⁰ and CPLR 214(5) provided a three-year time-bar on actions to recover for personal injury.¹⁶¹ New York also had other limitations periods for specific personal injuries.¹⁶² After *Wilson* government defendants argued that § 1983 actions were more like intentional torts so the one-year statute of limitations was the most analogous. Plaintiffs asserted that the three-year statute for general personal injury actions was more appropriate.

In January 1986, Judge McCurn, in the Northern District of New York, decided *Okure v. Owens*.¹⁶³ He held that New York's three-year, general personal injury statute was the most analogous limitations period for § 1983 claims.¹⁶⁴ Judge McCurn reasoned that the general statute was more appropriate because § 1983 encompasses a wide variety of claims, not all of which resemble intentional torts.¹⁶⁵ He also determined that a one-year period would not provide plaintiffs with sufficient time to assert their claims. The intentional tort limitations statute would thus contravene Congress' desire to provide an adequate remedy for violation of federal rights.¹⁶⁶

Less than two months later, Judge Munson, who also sits in the Northern District of New York,¹⁶⁷ addressed the same issue. In *Saun-*

159. *Id.* at 276. The Supreme Court stated that "the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." *Id.* at 266. The Court also emphasized the need for "firmly defined, easily applied rules" for selecting limitations periods. *Id.* (quoting *Chadron v. Fumero Soto*, 462 U.S. 650, 667 (1983)(Rehnquist, J., dissenting)).

160. N.Y. CIV. PRAC. L. & R. 215(3)(McKinney 1990)(providing a one-year limitations period to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy).

161. In 1985, 214(5) provided, "The following actions must be commenced within three years: . . . an action to recover damages for a personal injury except as provided in sections 214-b [exposure to agent orange in Indo-China] and 215 [intentional torts] . . ." N.Y. CIV. PRAC. L. & R. 214(5)(McKinney 1990)(see Historical and Statutory Notes).

162. See N.Y. CIV. PRAC. L. & R. 214(6)(three years for nonmedical malpractice), 214-a (two years plus six months for medical malpractice), 214-b (two years from discovery of injury from phenoxy herbicides [agent orange] in Indo-China during 1962-1975)(McKinney 1990).

163. 625 F. Supp. 1568 (N.D.N.Y. 1986).

164. *Id.* at 1571.

165. *Id.* at 1570-71.

166. *Id.* at 1571. Judge McCurn's discussion in *Okure* illustrates the type of policy analysis, traditionally left to legislatures, which borrowing forces judges to undertake.

167. Judges McCurn and Munson both sit in Syracuse, New York. Their offices are

ders v. New York,¹⁶⁸ he held that the most analogous statute of limitations for § 1983 claims was the intentional tort statute.¹⁶⁹ However, Judge Munson concluded that a one-year time-bar would contradict federal policy so he also borrowed the three-year, general personal injury statute of limitations.¹⁷⁰

The other judicial districts in the Second Circuit also struggled with which personal injury statute should apply. In New York the courts generally borrowed the three-year period under CPLR 214(5).¹⁷¹ Like Judge Munson, however, some judges believed that New York's intentional torts statute of limitations was more analogous to § 1983 claims. Nevertheless, they felt constrained to borrow CPLR 214(5) by language in *Pauk* stating that a limitations period which was less than two years would contravene federal policy.¹⁷² Unlike New York, Connecticut had a three-year statute of limitations for intentional torts.¹⁷³ Most of the judges in the Federal District for Connecticut concluded that § 1983 claims were more analogous to intentional torts so they borrowed Connecticut's intentional torts statute.¹⁷⁴ However, at least one judge initially assumed that Connecticut's limitations period for negligent and reckless torts¹⁷⁵ applied.¹⁷⁶

Instead of the predictability and uniformity which the Supreme Court hoped it would create, *Wilson* generated additional confusion in the Second Circuit and elsewhere.¹⁷⁷ The Second Circuit eventually heard an interlocutory appeal¹⁷⁸ in *Okure*.¹⁷⁹ Over the strong dissent

directly across the hall from one another. When *Okure* and *Saunders* were pending, the author was a judicial law clerk for Judge McCurn. The issue of which New York statute of limitations the court should borrow for § 1983 claims was hotly debated among the two judges' law clerks.

168. 629 F. Supp. 1067 (N.D.N.Y. 1986).

169. *Id.* at 1069.

170. *Id.* at 1070.

171. See, e.g., *Ladson v. New York City Police Dep't*, 614 F. Supp. 878 (S.D.N.Y. 1985); *Brandman v. North Shore Guidance Ctr.*, 636 F. Supp. 877 (E.D.N.Y. 1986); *Lee v. Coughlin*, 643 F. Supp. 546 (W.D.N.Y. 1986); *Brown v. Village of Albion*, 128 Misc. 2d 586, 490 N.Y.S.2d 958 (Sup. Ct. 1985).

172. See *Green v. Coughlin*, 633 F. Supp. 1166, 1169 (S.D.N.Y. 1986) (Goettel, J.); *Lee v. Coughlin*, 643 F. Supp. 546, 549 (W.D.N.Y. 1986) (Telesca, J.).

173. CONN. GEN. STAT. § 52-577 (1991).

174. See *DiVerniero v. Murphy*, 635 F. Supp. 1531, 1533-34 (D. Conn. 1986); *Weber v. Amendola*, 635 F. Supp. 1527 (D. Conn. 1985).

175. CONN. GEN. STAT. § 52-584 (1991).

176. See *Belcha v. DeBenedet*, No. N-85-212, 1986 WL 7556 (D. Conn. Feb. 4, 1986) (Dorsey, J.) (declining to apply *Wilson* retroactively but assuming that the two-year limitation for negligence torts would apply). Upon reconsideration, Judge Dorsey changed his mind and applied the three-year limitations period. *Belcha v. DeBenedet*, No. N-85-212, 1986 WL 15788 (D. Conn. June 18, 1986).

177. In her dissent in *Wilson*, Justice O'Connor foresaw this result. See *Wilson v. Garcia*, 471 U.S. 261, 286-87 (1985) (O'Connor, J., dissenting).

178. See 28 U.S.C. § 1292(b) (1988); FED. R. APP. P. 5(a).

of Judge Van Graafeiland,¹⁸⁰ the court affirmed Judge McCurn's decision.¹⁸¹ Elsewhere, the First, Tenth, and D.C. Circuits also selected general personal injury or residual state statutes.¹⁸² The Fifth, Sixth, and Eleventh Circuits borrowed intentional torts statutes,¹⁸³ including one-year limitations periods.¹⁸⁴ Several circuits issued inconsistent opinions.¹⁸⁵

The Supreme Court granted certiorari in *Okure*, less than three years after its decision in *Wilson*.¹⁸⁶ In a unanimous opinion the Supreme Court held that courts should borrow the state's general or residual personal injury statute of limitations for § 1983 claims.¹⁸⁷

The plaintiff in *Okure* filed his complaint on November 13, 1985.¹⁸⁸ He alleged that two State University of New York police officers arrested him without cause and beat him in violation of his constitutional rights.¹⁸⁹ The Supreme Court issued its decision on January 10, 1989.¹⁹⁰ It took more than three years of litigation and three judicial opinions, including a Supreme Court decision, just to determine whether Mr. Okure's complaint was timely. As a result, the district court and litigants had to wait over three years before the court could begin considering the merits of the case.¹⁹¹ During that time the liti-

179. See *Okure v. Owens*, 816 F.2d 45 (2d Cir. 1987), *aff'd*, 488 U.S. 235 (1989).

180. See *id.* at 49-54 (Van Graafeiland, J., dissenting).

181. *Id.*

182. See *Owens v. Okure*, 488 U.S. 235, 241-42 & n.6 (1989).

183. See *id.* at 241 & n.5.

184. See *Mulligan v. Hazard*, 777 F.2d 340, 344 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986); *Gates v. Spinks*, 771 F.2d 916, 920 (5th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).

185. See *Owens v. Okure*, 488 U.S. 235, 242 n.5 (1989).

186. *Owens v. Okure*, 485 U.S. 958 (1988) (granting certiorari).

187. *Owens v. Okure*, 488 U.S. 235, 236 (1989). The Supreme Court reasoned that borrowing an intentional torts limitations period would continue to create confusion and unpredictability because many states have multiple intentional torts statutes of limitations. *Id.* at 242-49. The Court also noted that § 1983 encompasses a wide variety of claims some of which do not resemble common law intentional torts. *Id.* at 249.

188. *Id.* at 237.

189. The Supreme Court described Mr. Okure's allegations as follows:

Okure alleged that, on January 27, 1984, the officers unlawfully arrested him on the SUNY campus in Albany and charged him with disorderly conduct. The complaint stated that Okure was "forcibly transported" to a police detention center, "battered and beaten by [the police officers] and forced to endure great emotional distress, physical harm, and embarrassment." As a result of the arrest and beating, Okure claimed, he "sustained personal injuries, including broken teeth and a sprained finger, mental anguish, shame, humiliation, legal expenses and the deprivation of his constitutional rights."

Id. (citations to the record omitted). See also *Okure v. Owens*, 625 F. Supp. 1568, 1569 (N.D.N.Y. 1986), *aff'd*, 816 F.2d 45 (2d Cir. 1987), *aff'd*, 488 U.S. 235 (1989).

190. *Owens v. Okure*, 488 U.S. 235, 235 (1989).

191. If the district court does not certify an interlocutory appeal after deciding that a

gants' lives were disrupted; they and the courts were forced to expend significant time and resources litigating the limitations issue; and the evidence was three years older by the time the various courts finally determined that Mr. Okure's claims were timely.

Moreover, *Owens v. Okure* is not a satisfactory solution to the problem of borrowing a limitations period for § 1983 claims. In both *Wilson* and *Okure*, the Supreme Court focused on the need for a practical approach to eliminate confusion and uncertainty, but the Court failed to address important equitable concerns. *Okure* solves only the problem of predictability within states; in each state the state's general or residual personal injury statute of limitations applies. *Okure* does not address the problem of uniformity among the states. A person's right to redress violations of constitutional and other important federal rights under § 1983 still varies from state to state depending on the length of the state's general, personal injury statute of limitations. The states' statutes currently range from one¹⁹² to six years.¹⁹³ A person in North Dakota¹⁹⁴ or Maine¹⁹⁵ who has been denied his or her First Amendment rights has six years in which to assert a claim, but a person in Kentucky¹⁹⁶ or Louisiana¹⁹⁷ loses the same First Amendment claim after only one year.¹⁹⁸ Such disparate treatment is particularly troubling when the individual's federally protected civil rights are at stake.¹⁹⁹

claim is timely, it decides the merits. A losing defendant can then challenge the district court's timeliness ruling on direct appeal after a final judgment on the merits. However, the district court and litigants will have wasted valuable time and resources litigating the merits if the court of appeals finds that the claim was originally time-barred. For this reason interlocutory appeals on timeliness issues are common even though interlocutory appeals are generally not favored in federal practice.

192. Whether a one-year time-bar violates the federal policy underlying § 1983 may still be an issue.

193. NYSBA REPORT, *supra* note 1, at 10.

194. N.D. CENT. CODE § 28-01-16(5)(1991).

195. ME. REV. STAT. ANN. tit. 14, § 752 (West 1980).

196. KY. REV. STAT. ANN. § 413.140(1)(a)(Michie/Bobbs-Merrill 1992).

197. LA. CIV. CODE ANN. art. 3492 (West 1992 Supp.).

198. See also CAL. CIV. PROC. CODE § 340(3)(West Supp. 1992)(one year); MASS. GEN. LAWS ANN. ch. 260, § 2A (West Supp. 1992)(three years); MO. ANN. STAT. § 516.120(4)(Vernon 1952)(five years); N.J. STAT. ANN. § 2A:14-2 (West 1987)(two years); N.Y. CIV. PRAC. L. & R. 214(5)(McKinney 1990)(three years); 42 PA. CONS. STAT. § 5524(2)(Supp. 1992)(two years); P.R. LAWS ANN. tit. 31 § 5298(2)(1991)(one year).

199. See NYSBA REPORT, *supra* note 1, at 12 (calling for congressional action to remedy the problem); Siegel, *Practice Commentary*, *supra* note 1, at 99 ("[I]t must strike any observer as incongruous that something as fundamentally 'federal' as a federal civil rights claim should be subject to varying periods from state to state.").

B. Borrowing the State's Tolling Provisions

The state's tolling law may further complicate the problem of determining whether a federal claim is time-barred. When the court borrows a state statute of limitations, it must also apply the state's tolling rules unless they are inconsistent with federal law.²⁰⁰ The Supreme Court has reasoned that the court relies on the state's balancing of interests when it borrows the state's limitations period. Therefore, the state's exceptions to its statutes of limitations "are an integral part of a complete limitations policy."²⁰¹ However, the

200. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (applying New York's tolling law to a § 1983 claim). See also *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 465 (1975).

201. *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980). The Supreme Court's reasoning in *Tomanio* is similar to the Court's rationale for applying state tolling provisions in diversity cases. See *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532-34 (1949) (affirmed by *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980)).

The Supreme Court has not, however, treated accrual of federal question claims the same as accrual of diversity claims. Federal Rule of Civil Procedure 3 provides that a civil action in federal court "is commenced by filing a complaint with the court." The Supreme Court has interpreted Rule 3 narrowly in diversity cases but not in federal question cases. In *Walker* the Court held that state law governing when an action commences for tolling the statute of limitations in diversity cases does not directly conflict with Rule 3. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980). Cf. *Hanna v. Plumer*, 380 U.S. 460 (1965) (holding that a controlling Federal Rule of Civil Procedure applies unless it is unconstitutional or outside the scope of the Rules Enabling Act.) Rule 3 merely measures other litigation time periods such as when a summary judgment motion may be brought. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51 (1980). Because the state's accrual law was an integral part of the state's statute of limitations in *Walker*, the federal court had to apply the state's accrual law for determining whether the state claim was timely. *Id.* at 748-49, 752-53. The Supreme Court refused to consider whether the state's law or Rule 3 would control accrual of a federal claim. *Id.* at 751 n.11.

The Supreme Court finally addressed the issue in *West v. Conrail*, 481 U.S. 35 (1987). In *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), the Supreme Court borrowed the six-month statute of limitations in § 10(b) of the National Labor Relations Act for certain hybrid actions under the Management Labor Relations Act. However, the Court subsequently refused to borrow the six-month service requirement for commencing an action under § 10(b). *West*, 481 U.S. at 38, 39-40. Stating that the Court had no intention of displacing the Federal Rules of Civil Procedure when it borrowed the statute of limitations in *DelCostello*, *id.* at 38, the Court held that a federal question claim is timely if it is filed pursuant to Rule 3 within the borrowed statute of limitations. *Id.*

The Supreme Court distinguished its treatment of diversity cases on federalism grounds:

When the underlying cause of action is based on state law, and federal jurisdiction is based on diversity of citizenship, state law not only provides the appropriate period of limitations but also determines whether service must be effected within that period. . . . Respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in

Supreme Court has also cautioned that the court must "borrow only what is necessary to fill in the gap left by Congress."²⁰²

To evaluate consistency with federal policy, the court must analyze and compare the policies underlying both the state's tolling provisions and the federal act.²⁰³ Then the court must examine the facts of the particular case to determine whether they fall within the state's tolling rules. This requires learning the state's tolling law. Although many states have codified tolling provisions,²⁰⁴ state tolling rules which are developed or interpreted in case law can be difficult to find and apply.²⁰⁵ Moreover, the state legislatures and courts adopt their tolling rules to protect state rights, not federal rights.²⁰⁶ In contrast,

a diversity suit "be considered part and parcel of the statute of limitations." . . . This requirement, naturally, does not apply to federal-question cases.

Id. at 39 n.4 (citations omitted). Discussing its previous decisions which required the lower courts to borrow the state's tolling rules in federal question cases, the Supreme Court emphasized that "[t]he governing principle is that we borrow only what is necessary to fill the gap left by Congress." *Id.* at 40 n.6; *see also id.* at 39-40 ("Inevitably our resolution of cases or controversies requires us to close interstices in federal law from time to time, but when it is necessary for us to borrow a statute of limitations for a federal cause of action, we borrow no more than necessary.")

202. *West v. Conrail*, 481 U.S. 35, 40 n.6 (1987); *see also id.* at 39-40.

203. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). *See also Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321 (1965) (quoting *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 427 (1965)) ("In order to determine . . . [whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances], we must examine 'the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act.'").

204. *See supra* note 19.

205. *See Marcus*, Memorandum, *supra* note 1, at 11-12. Even in states with statutory tolling provisions, courts generally have equitable power to develop additional tolling rules through common law. *See Fischer*, *supra* note 11, at 8-14 (discussing equitable tolling in California).

206. The Supreme Court explained the policy for borrowing the state's tolling provisions as follows:

Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and expectations thereto, on the prosecution of a closely analogous claim.

Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975). Even where the federal claim is "closely analogous" to a particular state claim, however, the state's statutory tolling provisions are usually general rules which apply to most of the state's limitations periods. *See, e.g.*, N.Y. CIV. PRAC. L. & R. 207 (defendant's absence from the state or residence under a false name); 208 (infancy or

federal tolling law is fashioned to protect federal rights.²⁰⁷ Accordingly, courts may be inclined to find that a state tolling provision contravenes federal policy even though applying the state's statute of limitations does not.²⁰⁸

Borrowing state tolling law thus generates additional unpredictability and litigation.²⁰⁹ It also leads to more disparity from state to state because each state has different tolling rules.²¹⁰

C. Borrowing Federal Statutes of Limitations

1. *Choosing the Most Analogous Federal Limitations Period*

Borrowing state law is the general rule.²¹¹ However, in some cases, the courts borrow a statute of limitations from another federal statute.²¹² This occurs when applying state law would create practical problems and conflict with federal policy.²¹³ The Supreme Court has emphasized that borrowing a federal time-bar is a "closely circumscribed exception to the general rule."²¹⁴ Nevertheless, courts borrow a federal limitations period "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and

insanity); 210(a),(b)(death of claimant or person liable)(McKinney 1990 & Supp. 1993). Moreover, the federal claim is frequently not "closely analogous" to a particular state claim. See *supra* text accompanying notes 104-06.

The Supreme Court's rationale is particularly tenuous when the court borrows the state's common law tolling rules for a federal claim. In this situation a state court, and not the state's legislature, is balancing state policies for a particular state claim in a specific dispute. If it is inappropriate for a federal court to balance similar federal interests for federal claims, it is particularly inappropriate to apply a state court's policy determinations for a state right to a federal right.

207. See Marcus, Memorandum, *supra* note 1, at 12.

208. See *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946)(applying the federal equitable tolling rule for fraudulent concealment to a federal equity claim which would be time-barred under the state's statute of limitations); Special Project, *supra* note 1, at 1055-56; Marcus, Memorandum, *supra* note 1, at 11. See also N.Y. ST. L. DIG., *supra* note 8, at 2 (characterizing the area as "murky").

209. See NYSBA REPORT, *supra* note 1, at 11; N.Y. ST. L. DIG., *supra* note 8, at 2 ("There is caselaw with general indications that tolls apply, but with only the most casual guideposts, if they can be called guideposts at all, by which to determine the circumstances that will invoke a toll and what toll will be invoked in the circumstances.").

210. NYSBA REPORT, *supra* note 1, at 10.

211. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2778 (1991).

212. See, e.g., *id.* at 2782; *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.* 483 U.S. 143 (1987); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

213. The courts assume that "Congress would [not] choose to adopt state rules at odds with the purpose or operation of federal substantive law." See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2778 (1991)(quoting *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 161 (1983)).

214. *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989).

when the federal policies at stake and the practicalities of litigation make the rule a significantly more appropriate vehicle for interstitial lawmaking."²¹⁵ Accordingly, courts and practitioners must scrutinize both state and federal statutes of limitations, as well as the underlying causes of action, to select the most appropriate limitations period.

As with borrowing state law, the Supreme Court has provided only minimal guidance for practitioners and the courts. Again, the first step is to decide whether a uniform limitations period should apply.²¹⁶ If uniformity is unnecessary, the most analogous state statute of limitations for each individual claim applies. If uniformity is more appropriate, one must then determine whether federal or state law²¹⁷ should provide the limitations period.²¹⁸

215. *Id.*

216. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.* 483 U.S. at 143, 147 (1987). See *supra* notes 98-100 and accompanying text.

217. The Supreme Court has recognized that characterizing a claim uniformly for borrowing a state limitations period will not create national uniformity. However, this fact alone will not override the presumption in favor of borrowing state law. *Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 489 (1980) ("[T]he need for national uniformity 'has not been held to warrant the displacement of state statutes of limitations for civil rights actions . . .'"). See also *Reed v. United Transp. Union*, 488 U.S. 319 (1989) (borrowing the state's limitation period for employee actions under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act). The Court has focused primarily on the practicalities of choosing a limitations period rather than on interstate fairness. Theoretically, a uniform characterization will provide predictability and avoid unnecessary litigation within each state. But see discussion *supra* text accompanying notes 141-99.

218. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987). At the time of writing, the Supreme Court's latest discussion on choosing statutes of limitations for federal claims is found in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). The same basic guidelines from *Malley-Duff & Assoc., Inc.* are set forth in the plurality portion of the opinion written by Justice Blackmun and joined by Chief Justice Rehnquist and Justices White and Marshall. *Id.* at 2779. See *Malley-Duff & Assocs., Inc.* 483 U.S. 143, 147 (1987). Justices O'Connor and Kennedy in their dissenting opinions apparently agree with the plurality's analytical approach but disagree with the plurality's result and retroactive application. *Gilbertson*, 111 S. Ct. at 2785-2788 (O'Connor, J., dissenting); *id.* at 2788-90 (Kennedy, J., dissenting). Justice Stevens believes that the Rules of Decision Act requires the Court to borrow state law. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172-73 (1983) (Stevens, J., dissenting); *Gilbertson*, 111 S. Ct. at 2784 n.2 (Stevens, J., dissenting). Justice Souter, who joined Justice Stevens' dissent in *Gilbertson*, agrees that borrowing a federal limitations period constitutes unwarranted judicial legislating. See *Gilbertson*, 111 S. Ct. at 2783-85 (Stevens, J., dissenting). Finally, Justice Scalia believes that state law applies of its own force unless Congress preempts it. See *id.* at 2783 (Scalia, J., concurring in part and in judgment); *Malley-Duff & Assocs., Inc.*, 483 U.S. at 158-65 (Scalia, J., concurring in judgment). When applying state law would interfere with federal policy, Justice Scalia would find that no limitations period should apply. *Gilbertson*, 111 S. Ct. at 2783; *Malley-Duff & Assocs., Inc.*, 483 U.S. at 163-64.

Writing for the plurality in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,²¹⁹ Justice Blackmun stated that the "geographic character of the claim" should be given "particular weight" in deciding whether to borrow federal or state law.²²⁰ For causes of action which may involve multi-state transactions, borrowing a federal statute of limitations is more desirable because it provides greater uniformity than borrowing state law. A uniform federal time-bar prevents forum shopping and confusion over which state's limitations period applies, particularly in multi-party, complex litigation.²²¹ For example, the Supreme Court has applied a federal statute of limitations to civil enforcement claims under RICO²²² and securities fraud claims under section 10(b) of the Securities Exchange Act²²³ and SEC Rule 10b-5.²²⁴

Borrowing a federal time-bar may also be more appropriate for hybrid²²⁵ actions.²²⁶ Where interdependent claims are combined, finding one state limitations period which does not contravene the federal policy of one of the claims will be more difficult.²²⁷ If more than one

219. 111 S. Ct. 2773 (1991).

220. *Id.* at 2779.

221. *See id.* at 2779 (quoting *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987)).

222. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) (applying the four-year statute of limitations for civil enforcement actions under the Clayton Act to civil enforcement actions under RICO).

223. The Supreme Court has recognized an implied, private right of action under § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, for fraud in the purchase and sale of securities. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773, 2779 (1991); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983).

224. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) (applying the statute of limitations in § 9(e) of the 1934 Securities Exchange Act to implied actions under § 10(b) of the same Act).

225. Hybrid actions contain two or more closely related, interdependent claims which are usually brought in the same suit. For example, when an employee loses a labor grievance/arbitration, the employee will generally sue the employer for breach of the collective bargaining agreement under § 301 of the Labor Management Relations Act and the union for breach of its duty of fair representation, which is implied under the National Labor Relations Act. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

226. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 161-62 (1983) (applying a federal statute of limitations to employee hybrid suits under the Labor Management Relations Act for the employer's breach of the collective bargaining agreement and the union's breach of its duty of fair representation). *Cf. McAlister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958) (applying a federal limitations period under the Jones Act to unseaworthiness actions under general admiralty law).

227. For example, in *DelCostello* the Supreme Court refused to borrow the state's limitations period for vacating an arbitration award for § 301/fair representation cases under the Labor Management Relations Act. The states' statutes of limitations for vacating arbitration awards are very short, usually measured in months instead of years. In a hybrid action, however, the employee must "evaluate the adequacy of the union's representation, . . . retain counsel, . . . investigate substan-

limitations period is applied to interdependent claims, practical litigation problems may arise which could also thwart federal policy.²²⁸

Furthermore, the court may choose a federal limitations period if the most analogous state statute of limitations is too short. A particularly short period is more likely to impair federal policy by preventing effective enforcement of the underlying right or settlement. For example, the Supreme Court has refused to apply a state time-bar to EEOC enforcement actions under Title VII.²²⁹ The Court concluded that applying a state limitations period would unduly restrict the EEOC's mission of investigating and settling employment discrimination disputes before formal litigation.²³⁰ Similarly, in *DelCostello* the Court borrowed the six-month statute of limitations governing unfair labor practices under the National Labor Relations Act for certain hybrid actions under the Labor Management Relations Act, instead of a ninety-day, state provision for vacating arbitration awards.²³¹

Even if borrowing federal law appears more desirable, the analysis is not complete. The general presumption in favor of borrowing state law still requires that "an analogous federal source truly affords a 'closer fit' with the cause of action at issue than does any available state-law source."²³² How litigants and courts make this determination with any degree of certainty and economy is unclear. One recourse is to compare the purposes and elements of the underlying federal claim with the state and federal analogs.²³³ However, Justice Blackmun conceded in *Gilbertson* that the factors to be considered will vary depending on the underlying claim and the possible analogs.²³⁴

tial matters that were not at issue in the [grievance/arbitration] proceeding, and . . . frame his suit," all within the limitations period. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 166 (1983). The Supreme Court concluded that borrowing the state's arbitration time-bars would create practical problems which would impair the employee's ability to vindicate his or her rights. *Id.* See also *id.* at 166 n.16 ("Besides its brevity, use of an arbitration limitations period raises knotty problems of categorization and consistency.")

228. For example, res judicata and collateral estoppel will generally force the plaintiff to bring a hybrid action within the shortest applicable limitations period. If this period is too short, the policies of the interdependent claim will be impaired. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983). Cf. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958).

229. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

230. *Id.* at 363-69.

231. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 166 (1983) (concluding that 90 days was too short to provide an employee with sufficient time to vindicate his or her rights).

232. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2779 (1991).

233. *Id.* (noting that "commonality of purpose and similarity of elements will be relevant").

234. *Id.*

Nevertheless, the Supreme Court has at least simplified the borrowing process for rights of action implied under federal statutes. If a federal statute contains an explicit cause of action which has an explicit statute of limitations, that limitations period will also apply to an implied right arising under the same statute.²³⁵ For example, the Supreme Court borrowed the limitations provision in section 9(e) of the Securities Exchange Act of 1934²³⁶ for securities fraud actions implied under section 10(b) of the same Act.²³⁷ Borrowing state law should only be considered if the express cause of action is not analogous to the implied right²³⁸ or, presumably, if applying the statutory period would contradict the purposes of the implied right.²³⁹ This exception to the presumption in favor of borrowing state law is based on the assumption that Congress would have reached the same balance of interests had it considered a limitations period for the implied right of action.²⁴⁰

2. Problems with Borrowing Federal Statutes of Limitations

Theoretically, borrowing limitations periods from federal statutes creates greater uniformity and fairness than borrowing from state law.²⁴¹ Moreover, Congress, and not the states, has balanced the interests of repose and prosecution. For these reasons, one might conclude that borrowing federal law should become the general rule.²⁴²

Borrowing from federal law is not the answer, however. Courts must still determine which federal statute of limitations is the best analog. Because more than one possibility usually exists, disagreements among the courts will continue to generate confusion and lack of uniformity.²⁴³ In such cases uniformity and predictability will only occur when the Supreme Court ultimately chooses one federal limitations period. Some critics also warn that Congress has not enacted enough statutes of limitations to provide adequate choices.²⁴⁴ Yet, having a number of choices only enhances the uncertainty and the problem of judicial legislating. In choosing the closest analog, the

235. *Id.* at 2780.

236. 15 U.S.C. § 78i(e)(1988).

237. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782 n.9 (1991).

238. *Id.* at 2780, 2781-82.

239. *See id.* at 2788 (Kennedy, J., dissenting).

240. *Id.* at 2780.

241. *See* NYSBA REPORT, *supra* note 1, at 3.

242. *See*, Kaulbach, *supra* note 45 (arguing that the presumption in favor of borrowing state limitations periods should be abandoned); Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitations*, 56 B.U. L. REV. 970, 984-87, 988 (1976) (arguing that the courts should look to federal statutes of limitations for applying laches).

243. Special Project, *supra* note 1, at 1081.

244. NYSBA REPORT, *supra* note 1, at 3.

judge must, at least, consider whether the interests in repose and prosecution are adequately served. Moreover, choices increase the temptation to decide what period of time is appropriate for the particular cause of action and then choose whichever analog has the closest limitations period, instead of actually looking for the most appropriate statute.²⁴⁵ Even implied rights of action arising under federal statutes with express time-bars can be problematic. The statute in question may have more than one explicit limitations period,²⁴⁶ and different causes of action may further different statutory goals.²⁴⁷

The Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*²⁴⁸ illustrates these problems. The federal courts have long recognized an implied, private right of action for securities fraud under section 10(b) of the 1934 Securities Exchange Act and SEC Rule 10b-5.²⁴⁹ Prior to *Gilbertson*, courts and legal scholars had struggled for years over what limitations period should apply. Some courts borrowed state law, applying either the state's common-law fraud or "blue sky"²⁵⁰ statute of limitations.²⁵¹ Other courts held that a uniform federal limitations period was required because of the multi-state nature of section 10(b) actions.²⁵²

The Supreme Court finally agreed to decide the issue in October

245. See *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1394 (7th Cir. 1990) (Posner, J., concurring) ("[W]e have the essential condition for standardless, discretionary judgment . . ."), *cert. denied*, 111 S. Ct. 2887 (1991).

246. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991).

247. See *id.* at 2789 (Kennedy, J., dissenting).

248. 111 S. Ct. 2773 (1991).

249. *Id.* at 2779 (noting that private actions implied under § 10(b) of the 1934 Securities Exchange Act have been allowed for "nearly half a century"); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983).

250. Blue Sky laws regulate securities offerings and sales. They are designed to protect citizens from investment fraud. BLACKS LAW DICTIONARY 173 (6th ed. 1990). According to BLACKS LAW DICTIONARY, the name "blue sky law" derives from "speculative schemes which have no more basis than so many feet of blue sky." *Id.* (citing *State v. Cushing*, 15 A.2d 740 (Me. 1940)).

251. See *Bath v. Bushkin, Gains, Gaines, and Jonas*, 913 F.2d 817 (10th Cir. 1990) (applying the state's common law fraud limitations period); *Nesbit v. McNeil*, 896 F.2d 380 (9th Cir. 1990) (applying the state's common law fraud limitations period); *Corwin v. Marney, Orton Investments*, 843 F.2d 194 (5th Cir. 1988) (applying the state's general fraud limitations period); *Durham v. Business Management Assocs.*, 847 F.2d 1505 (11th Cir. 1988) (applying the state's blue sky limitations period); *O'Hara v. Kovens*, 625 F.2d 15 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) (applying the state's blue sky limitations period); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C. Cir. 1977) (applying the state's blue sky limitations period).

252. See *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.) (*en banc*), *cert. denied sub nom. Vitiello v. I. Kahlowski & Co.*, 488 U.S. 849 (1988); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991).

1990.²⁵³ The plaintiffs in *Gilbertson* brought suit under section 10(b) against the New Jersey law firm and other defendants involved in preparing the offering memorandum for a number of limited partnerships in which the plaintiffs invested. The partnerships failed, and the IRS denied the plaintiffs certain tax benefits which the defendants had allegedly promised. The plaintiffs claimed that the defendants' misrepresentations in the offering memorandum induced their investment.²⁵⁴

Following more than thirty-years' precedent in the Ninth Circuit,²⁵⁵ the United States District Court for the District of Oregon held that Oregon's two-year limitations period for fraud applied to the plaintiffs' claims.²⁵⁶ The Ninth Circuit affirmed application of the state's statute of limitations.²⁵⁷ The Supreme Court reversed. The Court held that a uniform federal limitations period should apply to section 10(b) claims and looked to the Securities Exchange Act for the most analogous statute of limitations.²⁵⁸

The Securities Exchange Act of 1934, however, did not provide one, clear choice. The Act contains a number of explicit causes of action with separate statutes of limitations. Several sections provide that a claim must be brought within one year of discovering the facts constituting a violation, but no more than three years after the violation.²⁵⁹ Each provision, however, has slightly different language. Another section of the Act provides a two-year repose period rather than three years.²⁶⁰ Still another provision sets a five-year limitations period for insider trading.²⁶¹

The Securities Exchange Commission argued that the five-year period for insider trading, which Congress added in 1988, provided the closest analogy to 10(b) claims and Congress' most recent balancing of

253. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 242 (1990)(granting certiorari).

254. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2776-77 (1991).

255. *See id.* at 2785 & n.1 (O'Connor, J., dissenting).

256. *Id.* at 2777. The district court's opinion is not reported.

257. *Reitz v. Leasing Consultants Assocs.*, 895 F.2d 1418 (1990)(judgment entry)(text in Westlaw). *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2777 (1991). The Ninth Circuit reversed the district court's grant of summary judgment to the defendants and remanded on the issue of when the plaintiffs discovered or should have discovered the alleged fraud. The Ninth Circuit's opinion is unpublished but can be found on Westlaw under the Federal Reporter citation.

258. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2778 (1991).

259. *See* 15 U.S.C. §§ 77m, 78i(e), 78r(c)(1988).

260. 15 U.S.C. § 78p(b)(1988).

261. 15 U.S.C. § 78t-1(b)(4)(1988).

the relevant interests.²⁶² A plurality of the Supreme Court Justices, however, adopted a one-year period from discovery with a three-year repose statute.²⁶³ Justice Scalia reluctantly concurred after deciding that the plurality's approach was the least offensive alternative to determining a limitations period for implied causes of action.²⁶⁴ Justices O'Connor and Kennedy did not object to the one-year-from-discovery provision. However, they asserted that imposing a three-year repose statute on plaintiffs would contradict Congress' policy of deterring securities fraud and providing an effective remedy for victims.²⁶⁵

In addition to the practical problems of choosing the most analogous federal statute of limitations, the appropriate balancing of interests is not made when the court borrows federal law. Instead of providing general limitations periods, Congress has enacted statutes of limitations for specific federal rights, which are usually narrowly

262. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2777-78 (1991).

263. *Id.* at 2782. The Supreme Court rejected the five-year period, finding that Congress enacted the longer limitations period to enhance protection against insider trading. The Court found no indication that Congress intended to give greater protection for other violations of the Act. *Id.* at 2781. The Supreme Court also rejected the one-and-two-year limitations period because 15 U.S.C. § 78i "requires the disgorgement of unlawful profits and differs in focus from § 10(b). . . ." *Id.* at 2780 n.5. The Court apparently determined that the one-and-three-year period was more analogous to § 10(b) claims because it applies to a number of the Act's other causes of action. The Justices also concluded that § 9, 15 U.S.C. § 78i (1988), and § 18, 15 U.S.C. § 78r (1988), to which the one-and-three-year provision applies, have the same "focus" as § 10(b). *Id.* Sections 9 and 18 regulate securities transactions and impose reporting requirements to prevent manipulation of stock prices. *Id.* However, the dissent notes that these provisions are narrowly focused. Section 10(b) is a general remedy which is fashioned after common law fraud and designed to deter "all forms of securities fraud." *Id.* at 2789 (Kennedy, J., dissenting).

264. *Id.* at 2783 (Scalia, J., concurring in part and in judgment). Justice Scalia first criticized the federal courts' practice of "inventing" causes of action. Conceding that the Supreme Court had already recognized an implied right of action under § 10(b), he concluded that applying no time-bar would create irrational and unjust results although finding no limitations period might deter the courts from creating causes of action in the future. Alternatively, the Court could "imply" a limitations period, but such judicial legislating would be "too lawless to imagine." *Id.*

265. *Id.* at 2790. Justice Kennedy, joined by Justice O'Connor, concluded that the one-year-from-discovery period adequately balanced the investor's interests while preventing stale claims. *Id.* However, he stressed that the underlying basis for a § 10(b) claim is fraud. Accordingly, "[t]he real burden on most investors . . . is the initial matter of discovering whether a violation of the securities laws occurred at all. . . . '[C]oncealment is inherent in most securities fraud cases.'" *Id.* at 2789 (citation omitted). Justice Kennedy concluded that the "practicalities of litigation" and "the simple facts of business life" would prevent many injured investors from discovering the violation and filing suit within the three-year repose statute. A three-year absolute time-bar would thus thwart Congress' desire to provide an effective remedy for securities fraud. *Id.* at 2789-90.

drawn.²⁶⁶ For each limitations period, Congress has balanced the interests in asserting that specific right against the need for repose. Congress has not considered all the analogous federal rights to which the limitations period could be applied in a borrowing scenario. Rather, the court is left to balance the appropriate policy interests.²⁶⁷ Even with implied statutory causes of action, the court must guess which limitations period Congress would have selected. When a number of possibilities exist, the temptation is great to first decide the appropriate period of repose and then look for an analog with that time period. Moreover, the problem of unfair surprise to actual and potential litigants is just as great when the court borrows a new federal limitations period as when it borrows state law because the new federal period will be retroactive.²⁶⁸

D. No Applicable Statute of Limitations

Finally, the courts have occasionally decided that when Congress is silent, no limitations period should apply.²⁶⁹ For example, in *Occidental Life Insurance Company v. EEOC*, the Supreme Court held that EEOC enforcement actions under Title VII of the 1964 Civil Rights Act are not subject to a statute of limitations.²⁷⁰ The Court concluded that applying a state statute of limitations would put undue pressure

266. See *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 168 (1987)(Scalia, J., concurring in judgment)("Federal statutes of limitations . . . are almost invariably tied to specific causes of action."); PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 533 (3d ed. 1988)("Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives.").

267. In his concurring opinion in *Malley-Duff & Assocs., Inc.*, Justice Scalia explained: In deciding whether to borrow a federal statute that clearly does not apply by its terms, however, we genuinely will have to determine whether, for example, the Clayton Act's limitations period will better serve the policies underlying civil actions under RICO than the limitations period covering criminal actions under RICO, or whether either will do the job better than state limitations upon actions for economic injury. That seems to me to be quintessentially the kind of judgment to be made by a legislature."

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 169 (1987)(Scalia, J., concurring in judgment).

268. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782 (1991). Congress has attempted to legislatively overrule the retroactive effect for SEC § 10(b) cases. 15 U.S.C. § 78aa-i. See *supra* note 140.

269. See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977)(EEOC enforcement actions under Title VII of the Civil Rights Act of 1964); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240-44 (1985)(federal common law actions by Indians to protect tribal property rights); *Public Interest Research Group v. United States Metals Refining Co.*, 681 F. Supp. 237, 239 (D.N.J. 1987)(citizen enforcement actions under the Clean Water Act), *overruled by* *Public Interest Research Group v. Powell Duffryn Terminals, Inc.* 913 F.2d 64 (3d Cir. 1990).

270. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 366 (1977).

on the EEOC's administrative duties.²⁷¹ Although such rulings are rare, the possibility that no time-bar applies must be considered.

The practice of borrowing limitations periods for federal claims thus puts a undue burden on both the judiciary and litigants. When Congress neglects to enact a statute of limitations for a federal claim, litigants and judges must scrutinize both federal and state statutes for the most appropriate analog. The task can be daunting, depending on the number of possibilities. Litigants and judges may have to choose among a number of close analogs or select one where no close comparison exists. They must also examine the underlying federal cause of action and its legislative history to make sure that Congress did not, in fact, intend that an indefinite limitations period apply.

The resulting uncertainty creates both practical and equitable problems. Scarce time and resources are spent determining and litigating limitations issues before the merits can be addressed. Judges must make policy determinations which are better left to Congress, and both litigants and courts are subject to surprise by subsequent limitations litigation.²⁷² More importantly, disagreements among the courts and the general practice of borrowing state limitations periods mean that individuals' federal rights vary from circuit to circuit, state to state, and sometimes within the same state. This confusion, inequity, and cost in time and resources has prompted repeated calls for Congressional action.²⁷³ Congress finally responded by enacting section 313 of the Judicial Improvements Act of 1990.²⁷⁴

IV. LEGISLATIVE HISTORY OF 28 U.S.C. § 1658

The Judicial Improvements Act of 1990²⁷⁵ is composed of eight titles which cover a wide range of topics.²⁷⁶ The federal fallback statute

271. *Id.* at 368-71.

272. *See* Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1394 (7th Cir. 1990)(Posner, J., concurring), *cert. denied*, 111 S. Ct. 2887 (1991).

273. *See, e.g.*, Marcus, Memorandum, *supra* note 1, at 5; NYSBA REPORT, *supra* note 1, at 16; Siegel, *Practice Commentary*, *supra* note 1, at 99-100; Special Project, *supra* note 1, at 1105. *Cf.* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 170 (1987)(Scalia, J., concurring in judgment)(suggesting that applying no limitations period to civil RICO claims "might even prompt Congress to enact a limitations period that it believes 'appropriate,' a judgment far more within its competence than ours.").

274. Section 313 is codified at 28 U.S.C. § 1658 (Supp. 1991).

275. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

276. Congress passed the Judicial Improvements Act of 1990 on October 27, 1990, during an all-night session. Each title is a separate act. Title I, The Civil Justice Reform Act of 1990, is designed to help the federal courts reduce the cost and delay of civil litigation. It requires each district court to create a "civil justice expense and delay reduction plan." 28 U.S.C. §§ 471-482 (Supp. 1991). Title II, The Federal Judgeship Act of 1990, establishes 11 new circuit judgeships and 74 new district court judgeships. 28 U.S.C. §§ 44(1), 133. Title III, The Federal

of limitations is included in Title III, the Federal Courts Study Committee Implementation Act of 1990.²⁷⁷ Title III adopts a number of the Federal Courts Study Committee's noncontroversial recommendations.²⁷⁸ These reforms, including section 313, are designed to "substantially improve the efficiency and fairness of federal court operations."²⁷⁹

Congress established the Federal Courts Study Committee²⁸⁰ in late 1988, in response to growing "congestion, delay, expense, and expansion" within the federal courts.²⁸¹ The Committee was directed to study the problems facing the federal courts, develop a "long-range plan" for the federal judiciary, and recommend changes in existing federal law.²⁸² Its members included representatives from the three

Courts Study Committee Implementation Act of 1990, enacts some of the Federal Courts Study Committee's proposals for federal court reform. Pub. L. No. 101-650, §§ 301-325, 104 Stat. at 5104-21 (codified in various sections of Title 28 of the United States Code). Title IV, The Judicial Discipline and Removal Reform Act of 1990, deals with judicial impeachment and discipline. Title IV creates the National Commission on Judicial Impeachment to study discipline and removal of federal judges and to make recommendations to Congress. Pub. L. No. 101-650, §§ 401-418; 104 Stat. at 5122-27 (1990)(codified in various sections of Title 28 of the United States Code). The other four sections of the Judicial Improvements Act do not deal with the federal courts. They involve a variety of topics ranging from computer software to television violence.

277. Pub. L. No. 101-650, 104 Stat. 5104, 5115 (1990)(codified at 28 U.S.C. § 1658 (Supp. 1991)).

278. H.R. REP. NO. 101-734, 101st Cong., 2d Sess. 15, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6861.

279. *Id.* Title III includes a number of important changes in addition to the fallback statute of limitations. Section 310 codifies pendant and ancillary jurisdiction under the name "supplemental jurisdiction." It also overrules *Finley v. United States*, 490 U.S. 545 (1989), by authorizing pendant party jurisdiction in federal question cases. 28 U.S.C. § 1367 (Supp. 1991). Section 311 amends the general venue statute. It eliminates the plaintiff's residence as a basis for venue in diversity cases. 28 U.S.C. § 1391(a)(Supp. 1991). Section 311 expands venue based on where the claim arose to "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(a),(b),(e). It also creates uniform bases for venue in diversity and federal question cases except for a strange disparity in § 1391(a)(3) and (b)(3). 28 U.S.C. § 1391(a), (b). Finally, section 311 defines a corporation's residence by where the corporation is subject to personal jurisdiction when the action commences. 28 U.S.C. § 1391(c). Section 312 limits removal under 28 U.S.C. § 1441(c)(Supp. 1991). Defendants may now remove cases involving separate and independent claims only in federal question cases. 28 U.S.C. § 1441(c).

280. Federal Courts Study Act, 28 U.S.C. § 331 (1988)(codified as a revision note). Congress passed the Federal Courts Study Act on November 19, 1988. It became effective on January 1, 1989. The Act directed the Chief Justice of the United States to appoint the members of the Federal Courts Study Committee within 10 days of the effective date. *Id.*

281. *See* FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (1990).

282. 28 U.S.C. § 331 (Supp. 1991).

branches of the federal government, state government, and the practicing bar.²⁸³ Over a fifteen-month period, the Committee sought recommendations from a broad range of interested groups and organizations, conducted research, solicited comments on proposals, and held public hearings. The Committee issued its report on April 2, 1990.²⁸⁴

Among the materials upon which the Federal Courts Study Committee relied were two working reports, one by Professor Richard I. Marcus²⁸⁵ and the other by the Commercial and Federal Litigation Section of the New York State Bar Association.²⁸⁶ Both reports discussed the problems with borrowing statutes of limitations for federal claims. Professor Marcus recommended that Congress supply statutes of limitations for existing federal statutory claims that lack them. He also recommended that Congress adopt general fallback statutes of limitations for nonstatutory federal claims.²⁸⁷

Like Professor Marcus, the New York State Bar Association Sec-

283. The Committee included the Hon. Joseph F. Weis, Jr., Chair, United States Court of Appeals Judge for the Third Circuit; J. Vincent Aprile II, General Counsel of the Kentucky State Department of Public Advocacy; the Hon. Jose' A. Cabranes, United States District Court Judge for the District of Connecticut; the Hon. Keith M. Callow, Chief Justice of the Supreme Court of Washington; the Hon. Levin H. Campbell, Chief Judge of the United States Court of Appeals for the First Circuit; Edward S.G. Dennis, Jr., Assistant Attorney General for the Criminal Division of the United States Department of Justice; Charles E. Grassley, United States Senator from Iowa; Morris Harrell, Partner in the law firm of Locke, Purnell, Rain, Harrell in Dallas, Texas; Howell T. Heflin, United States Senator from Alabama; Robert W. Kastenmeier, United States Representative from Wisconsin; the Hon. Judith N. Keep, United States District Court Judge for the Southern District of California; Rex E. Lee, Jr., President of Brigham Young University; Carlos J. Moorhead, United States Representative from California; Diana Gribbon Motz, Partner in the law firm of Frank, Bernstein, Conway & Goldman in Baltimore, Maryland; and the Hon. Richard A. Posner, United States Court of Appeals Judge for the Seventh Circuit. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE Part II at 193-96 (1990). For additional biographical information on the Committee members and the names of the senior staff, reporters, advisors, consultants, and organizations that contributed to the Committee's work, see *id.* at 193-203.

284. For discussion on the Committee and its report see generally Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 154-70 (1992); William K. Slate II, *Report of the Federal Courts Study Committee: An Update*, 21 SETON HALL L. REV. 336 (1991); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.6, at 3-8 (1992 Supp.).

285. See Marcus, Memorandum, *supra* note 1.

286. See NYSBA REPORT, *supra* note 1.

287. In his cover memorandum Professor Marcus states:

This memorandum proposes that the Federal Courts Study Committee recommend that Congress (1) establish limitations periods for Congressionally-created federal claims that presently lack such periods, and (2) adopt fallback limitations periods for those federal claims, such as claims implied by courts, that Congress did not explicitly create. In addi-

tion on Commercial and Federal Litigation suggested that Congress adopt specific statutes of limitations for the major, existing statutory claims lacking them. The report further recommended enacting a "catch-all" statute for other federal claims without limitations periods. Finally, the Section suggested establishing uniform tolling provisions for federal statutes of limitations.²⁸⁸ Recognizing that retroactivity could be a problem, the report warned, "In enacting federal statutes of limitations, Congress should address the issue of retroactivity and should specify an effective date for the application of the enacted limitations periods."²⁸⁹

The Federal Courts Study Committee essentially adopted Professor Marcus' recommendations.²⁹⁰ It recommended that Congress enact statutes of limitations for the major, existing statutory claims without limitations periods. The report also stated that Congress should enact fallback limitations periods for judicially implied claims and "any other federal claim not specifically covered by a limitations provision."²⁹¹ In support of its recommendations, the Committee con-

tion, it would be helpful if a compilation were prepared of the limitations periods of those federal claims that have them.

Marcus, Memorandum, *supra* note 1, at 1.

288. Section V of the report states:

This Section recommends that Congress enact express statutes of limitations for the major federal statutory causes of action that now lack them. Such causes of action include but are not limited to those in the areas of federal securities regulation, civil rights and labor law mentioned previously in this Report. Congress should also enact a general "catch-all" statute of limitations to govern all causes of action not otherwise provided for. Finally, Congress should enact uniform tolling provisions to govern the application of all federal statutes of limitations. Under current law, the federal courts borrowing and applying state statutes of limitations for federal causes of action frequently borrow the state tolling rules which extend the limitations periods under certain specified conditions. In the interest of uniformity, such matter should not be left to state law.

NYSBA REPORT, *supra* note 1, at 16.

289. *Id.* The report concluded that case law could resolve questions of accrual and survival of actions.

290. The Committee's recommendations on statutes of limitations for federal claims are found in Chapter 5. This chapter contains the Committee's suggestions to "reduce unnecessary litigation, to simplify unnecessarily complex litigation, and to help federal courts process litigation as effectively as possible." FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 89 (1990).

291. The Committee's report states:

Regarding statutes of limitations, Congress should (1) adopt limitations periods for major congressionally created federal claims that presently lack such periods, and (2) adopt fallback limitations periods for federal claims (such as those implied by the courts) not explicitly created by Congress and for any other federal claim not specifically covered by a limitations provision. Before the adoption of such legislation, existing federal statutes of limitations should be surveyed for any guidance they

cluded that borrowing "appears to lack persuasive support as a matter of policy."²⁹² It also emphasized the practical problems of borrowing including uncertainty and lack of uniformity.²⁹³

Representative Robert Kastenmeier, Chair of the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice, had previously introduced a bill in Congress to establish a ten-year fallback statute of limitations for federal statutes lacking limitations periods.²⁹⁴ This provision would have applied to both existing and prospective federal legislation.²⁹⁵ The bill met with criticism²⁹⁶ and was never acted upon.

Concerned about the effect a general limitations period might have on existing federal legislation, the Subcommittee on Courts, Intellectual Property, and the Administration of Justice decided to take a

may provide as to lengths of periods for various types of actions, and to determine whether existing limitations provisions are inconsistent enough to warrant revision.

Id. at 93. The report also recommends that Congress not abandon the federal fraudulent concealment doctrine. *Id.* Under statutes of limitations in the "Summary and Conclusions" section, the report states, "Adopt statutes for major claims and fall-back limitations for others." *Id.* at 183.

292. *Id.* at 93.

293. The Federal Courts Study Committee Report provides in part:

Borrowing, while defensible as a decisional approach in the absence of legislation, appears to lack persuasive support as a matter of policy. It also creates several practical problems: It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods. The present approach may promote uniform limitations periods between related state and federal claims, but that is a relatively minor benefit, especially given the uncertainty surrounding which statute will govern and the possibility of filing in different states with different time periods.

Id.

294. H.R. 3553, 101st Cong., 1st Sess., 135 Cong. Rec. H 7835 (1989).

295. The bill provided in relevant part:

Except as otherwise provided by law, a civil action arising under an Act of Congress may not be commenced later than 10 years after the cause of action accrues.

....

... The amendments made by this Act shall take effect 60 days after the date of the enactment of this Act and shall apply with respect to causes of action accruing on or after the date such amendments take effect.

H.R. 3553, 101st Cong., 1st Sess. (1989).

296. Interview with Charles Geyh, former counsel to the House Judiciary's Subcommittee on Courts, Intellectual Property, and Administration of Justice, in Harrisburg, Pa. (Sept. 23, 1992). In 1945, Congress also considered a one-year general statute of limitations; however, one-year was deemed too short for civil rights, antitrust, and trademark and patent infringement actions. Marcus Memorandum, *supra* note 1, at 5.

more cautious approach.²⁹⁷ The Federal Courts Study Committee's Report recommended doing a survey of existing federal statutes of limitations before enacting new legislation.²⁹⁸ A survey would provide guidance for enacting new limitations periods and determining whether existing periods needed revision.²⁹⁹ However, a survey could not be completed within the time left in the 101st Congress. Rather than waiting and perhaps losing the momentum for reform,³⁰⁰ Representatives Kastenmeier and Carlos Moorhead³⁰¹ introduced a second bill in the House.³⁰² Section 111 of H.R. 5381 provided a four-year fallback statute of limitations for claims arising under future federal legislation.

At the hearings before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice,³⁰³ the majority of witnesses who commented on the proposed fallback provision strongly urged that it apply to causes of action arising under existing federal law as well as future legislation.³⁰⁴ Only George C. Freeman, Jr., Chair of the American Bar Association Business Law Section, argued that it should not be retroactive. He stated that applying the fallback provision to existing law would upset cer-

297. Interview with Charles Geyh, *supra* note 296.

298. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 93 (1990).

299. *Id.* See *supra* note 291.

300. Interview with Charles Geyh, *supra* note 296.

301. Representative Moorhead was the ranking minority member of the Subcommittee on Courts, Intellectual Property, and the Administration of Justice.

302. H.R. 5381, 101st Cong., 2d Sess. § 112 (1990). H.R. 5381 was introduced on July 26, 1990.

303. *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House of Representatives Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990)[hereinafter *Hearing*]. The hearing was held on September 6, 1990.

304. Those recommending retroactivity included the Hon. Deanell R. Tacha, United States Court of Appeals Judge for the Tenth Circuit and Chair of the Judicial Conference Committee on the Judicial Branch, *id.* at 146, and Alan B. Morrison, Director of the Public Citizen Litigation Group, *id.* at 224. Assistant Attorney General Stuart Gerson, representing the United States Department of Justice, also urged that the general statute of limitations be retroactive as applied to private citizens but that no limitations period apply to suits brought by the United States. *Id.* at 184, 198. The Hon. Joseph F. Weis, Jr., United States Court of Appeals Judge for the Third Circuit and Chair of the Federal Courts Study Committee, stated that the prospective statute of limitations was a "good start" but expressed concern that Congress not delay enacting specific statutes of limitations for existing federal claims. *Id.* at 92. Robert M. Landis, Former Chair of the ABA Standing Committee on Federal Judicial Improvements, did not discuss the retroactivity issue. He testified that the ABA had not formulated a policy on the proposal but indicated that the Standing Committee on Federal Judicial Improvements approved of reducing the proposed limitations period from 10 to four years. *Id.* at 242.

tainty and predictability.³⁰⁵

Whether a statute should be retroactive raises fairness concerns. As discussed in Part III, a new, retroactive time-bar may unfairly surprise actual and potential litigants.³⁰⁶ However, Mr. Freeman's reasoning presents a false dichotomy. He apparently assumed that a general statute of limitations would be either absolutely prospective or absolutely retroactive. If it were absolutely prospective, the new time period would apply only to statutes enacted after the fallback statute was enacted.³⁰⁷ If it were absolutely retroactive, the new period would apply to all claims arising under existing and future federal law, regardless of when the claim accrued. However, a third possibility exists, limited retroactivity. The general limitations period could apply to both existing and prospective federal law but only to those claims accruing after the limitations statute was enacted.

Except for the retroactivity issue, the proposed statute of limitations generated little criticism.³⁰⁸ The Subcommittee decided to recommend the prospective limitations period to the House Judiciary Committee; the Committee staff would then commission a survey of existing federal statutes of limitations the following year.³⁰⁹ Once the survey was completed, the Subcommittee could reconsider what should be done about the existing federal statutes that lacked explicit time-bars.³¹⁰ The House Judiciary Committee favorably reported H.R. 5381 to the full House on September 18, 1990.³¹¹

305. *Id.* at 246. Mr. Freeman's testified as follows:

We strongly urge you to not make it [the federal statute of limitations] retroactive. The very reasons for having a uniform Federal statute of limitations where none is presently specified is to provide certainty and predictability. But making it retroactive is counter to those very principles.

Our section of the association has been deeply disturbed by the growing trend in recent years to make legislation and regulation retroactive. Prior to 20 years ago no statute in the United States nor any regulation was retroactive. That was because we have a great common law tradition in this country that goes back even before our Constitution of not having retroactive legislation. It was anathema to the common law, and the reason it was anathema was because the law was normally based on the theory that a person ought to know what the law is and conform his conduct to it accordingly.

So we strongly urge you not to make it retroactive.

Id.

306. See *supra* text accompanying notes 130-40.

307. Of course, Congress could make the new statute retroactive, which would not solve Mr. Freeman's problem.

308. Interview with Charles Geyh, *supra* note 296.

309. *Id.*

310. *Id.*

311. See H.R. Rep. No. 101-734, 101st Cong., 2d Sess. 16 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6861. The Senate did not draft a separate bill. Instead, it adopted H.R. 5381 as an amendment to S. 2648. See 136 Cong. Rec. S17583 (daily ed. Oct. 27, 1990).

Congress subsequently passed H.R. 5381 as Title III of the Judicial Improvements Act of 1990, which the President signed into law on December 1, 1990. A survey of federal limitations periods has been completed.³¹² As of this writing, however, Congress has provided neither specific nor general statutes of limitations for those causes of action, without explicit time-bars, which arise under federal law existing on or before December 1, 1990.

V. 28 U.S.C. § 1658

A. Prospective Legislation

Section 313 of the Judicial Improvements Act of 1990 establishes a general fallback statute of limitations for civil claims arising under federal legislation enacted after December 1, 1990.³¹³ A plaintiff must commence his or her action no later than four years after the claim accrues. Section 313 applies only to Congressional legislation passed after December 1, 1990. It does not apply to federal statutory claims with explicit limitations periods, federal acts effective on or before December 1, 1990, criminal legislation,³¹⁴ or claims arising under federal common law. Whether section 313 applies to causes of action implied under federal statutes enacted after December 1, 1990, is unclear.³¹⁵

Congress enacted section 313 in response to the "practical" problems which borrowing creates for judges and litigators. The House Report accompanying section 313³¹⁶ quotes directly from the Federal Courts Study Committee Report. It emphasizes that borrowing "obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variances among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods."³¹⁷ The Report states that the fallback statute is designed to address these problems.³¹⁸

No general fallback period of limitations would be ideal for every

312. Interview with Charles Geyh, former counsel to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and Administration of Justice, in Harrisburg, Pa. (Sept. 25, 1992).

313. Section 313 provides in relevant part: Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues. 28 U.S.C. § 1658.

314. Congress has enacted a five-year fallback statute of limitations for non-capital criminal actions. 18 U.S.C. § 3282 (1988).

315. See *infra* text accompanying notes 328-30.

316. H.R. Rep. No. 101-734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870.

317. *Id.*

318. *Id.*

claim. A cursory look at existing federal statutes of limitations³¹⁹ suggests that four years may be somewhat long. For example, causes of action which resemble traditional personal injury actions generally have shorter time-bars.³²⁰ However, many federal limitations provisions are four or more years. For example, actions involving contractual or commercial rights, fraud, or government enforcement tend to have longer statutes of limitations.³²¹ Because Congress is free to enact a shorter time-bar when creating a new cause of action, the fallback limitations period should err in favor of plaintiffs.

Four years is a reasonable compromise, at least for prospective causes of action. Plaintiffs and their attorneys have substantial time to discover, investigate,³²² and assert most claims. Moreover, four years does not seem to be an unreasonably long time to hold potential defendants liable for most past actions. Where four years is either too long or too short, Congress is free to enact a different statute of limitations for that particular cause of action. In fact, the most important function which Section 313 may serve is to put Congress on notice. Congress must now specify a different limitations period in the language of a new statute if it does not want section 313 to apply. Accordingly, section 313 should induce Congress to pay more attention to what the limitations period should be and engage in the proper balance-

319. For a discussion of some of the states' general statutes of limitations see *infra* notes 344, 353, 354, 368 and accompanying text.

320. See e.g., 5 U.S.C. § 8122(a)(1988)(providing a three-year limitations period to recover under the Federal Employees' Compensation Act); 46 U.S.C. § 763a (1988)(providing a three-year limitations period for personal injury or death from maritime torts); 42 U.S.C. § 1986 (1988)(providing a one-year limitations period for neglecting to prevent a conspiracy to interfere with civil rights); 45 U.S.C. § 56 (1988)(providing a three-year limitations period to recover for personal injury under the Federal Employers' Liability Act). Cf. 28 U.S.C. § 2401 (1988)(providing a two-year limitations period for presenting tort claims against the United States to the appropriate federal agency).

321. See, e.g., 15 U.S.C. § 78t-1(b)(4)(1988)(providing a five-year limitations period for insider trading); 28 U.S.C. § 2401(a)(1988)(providing a six-year general statute of limitations for nontort actions against the United States); 28 U.S.C. § 2415(a)(1988)(providing a six-year limitations period for contract actions brought by the United States); 28 U.S.C. § 2462 (1988)(providing a five-year general limitations period for government enforcement of a civil fine, penalty, or forfeiture); 35 U.S.C. § 286 (1988)(providing a six-year limitations period for patent infringement); 38 U.S.C. § 1984(b)(1988)(providing a six-year limitations period for claiming benefits under United States Government Life Insurance or National Service Life Insurance); 41 U.S.C. § 604 (1988)(providing a six-year limitations period for government actions against a public contractor for misrepresentation or fraud against the United States). Cf. 15 U.S.C. § 15(b)(1988)(providing a four-year limitations period for civil enforcement actions under the Clayton Act). But see 17 U.S.C. § 507(b)(1988)(providing a three-year limitations period for copyright infringement).

322. Federal Rule of Civil Procedure 11 mandates that a reasonable inquiry be made into both the facts and the law before a complaint is filed. See *supra* note 53.

ing of interests. Unfortunately, the opposite may prove to be true. Knowing that a fallback period already exists, Congress may be even less inclined to worry about appropriate statutes of limitations when writing new law.³²³

Section 313 also eliminates the problem of borrowing state tolling provisions for new federal legislation. State tolling law does not apply to federal claims with explicit statutes of limitations because Congress' intent to create a uniform limitations period for a particular federal right would be thwarted.³²⁴ Rather, the courts apply federal tolling principles, usually developed through common law.³²⁵ Although section 313 does not expressly address tolling, it now provides an explicit federal statute of limitations for new causes of action which lack them. Therefore, only federal tolling principles should apply. The House Report supports this conclusion.³²⁶ Moreover, borrowing the states' tolling laws would controvert Congress' intent to provide a uniform limitations period for prospective federal legislation. As a result, courts and litigants will no longer have to search state law to determine what tolling provisions might govern, but must look only to federal law. More importantly, uniform tolling principles will apply to new federal claims instead of varying from state to state.³²⁷

323. See Maggs, *supra* note 284, at 160. Section 102 of the 1991 Civil Rights Act appears to be an example of Congress' continuing neglect. Section 102 provides damages for intentional discrimination under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 (ADA), and the Rehabilitation Act of 1973. 42 U.S.C. § 1981a (Supp. 1991). In creating a damage remedy Congress did not amend the anti-discrimination statutes. Instead, it codified section 102 as a separate statute. *Id.* Because section 102 does not contain a statute of limitations, the four-year fallback limitations period should apply. This would impose an four-year outside statute of limitations on damage claims under the Title VII, ADA, and the Rehabilitation Act where none has previously existed. Moreover, the four-year fallback statute of limitations would not affect claims for equitable relief under the same statutes. It is doubtful that Congress intended this result. In fact, in the 1991 Civil Rights Act Congress expressly eliminated a two-year outside statute of limitations governing claims under the Age Discrimination in Employment Act (ADEA) to conform ADEA filing procedures with Title VII. Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (1991). See 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991).

324. See *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 433 (1965); Siegel, *Practice Commentary*, *supra* note 1, at 100.

325. See *supra* text accompanying notes 39-40.

326. See H.R. REP. NO. 101-734, 101st Cong., 2d Sess. 24, reprinted in 1990 U.S.C.C.A.N. 6860, 6870 stating that borrowing "disrupts the development of federal doctrine on the suspension of limitation periods").

327. Different tolling rules may develop for different causes of action. However, the same principles will apply throughout the country to the same right.

B. Implied Causes of Action

Section 313 does not apply to causes of action implied under federal statutes enacted on or before December 1, 1990, or implied under the Constitution. Whether the fallback provision applies to causes of action implied under federal statutes enacted after December 1, 1990, is unclear. The language of section 313 refers to civil actions "arising under" acts of Congress. When the courts recognize an implied right of action, the claim is implied from the statutory language and intent.³²⁸ The implied claim can be said to "arise under" that statute. Accordingly, the courts may assume that Congress intends them to apply section 313.

However, Congress cannot intend that a particular period apply if Congress is not aware that the right exists when it enacts the statute.³²⁹ If the statute contains an analogous cause of action with an explicit limitations period, the courts may assume that Congress intended for that limitations period to govern the implied right, pursuant to the rule in *Gilbertson*. Otherwise, the courts must borrow state law.³³⁰ Unfortunately, Congress left this issue for the courts to resolve.

C. Pre-Act Legislation and Federal Common Law Actions

Section 313 addresses only a small portion of the "borrowing problem" because it is limited to new federal statutes. Courts must still borrow statutes of limitations for all federal claims without explicit limitations provisions arising or implied under statutes enacted on or before December 1, 1990. Borrowing also applies to federal common law claims. The length of time in which litigants may assert their federal rights, including their constitutional rights, will continue to vary from state to state, and even within some states, according to which statutes of limitations the courts borrow. Courts and litigants will continue spending valuable time and resources researching and litigating limitations issues. Litigants will also continue shopping for jurisdictions with the longest limitations period, placing an undue burden on certain jurisdictions and unnecessarily inconveniencing defendants and witnesses. All of the problems which induced Congress to enact a fallback statute of limitations thus remain for the vast majority of federal claims which currently lack explicit limitations provisions.³³¹

The legislative history indicates that Congress did not make section

328. See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

329. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring in part and in judgment). But see *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring).

330. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2780 (1991).

331. See N.Y. ST. L. DIG., *supra* note 8, at 2 (stating that "it will probably take a gener-

313 retroactive because it was afraid to disrupt numerous court decisions which have adopted limitations periods for existing federal legislation.³³² Citing George Freeman's hearing testimony, the House Report states that making section 313 retroactive would "threaten to disrupt the settled expectations of a great many parties."³³³ Ironically, it is the current system of borrowing which prevents predictability and equity.³³⁴ As the Supreme Court's decision in *Gilbertson* demonstrates, borrowing can resemble a game of Russian roulette. Even when the statute of limitations appears to be settled in a particular district or circuit, the plaintiff may suddenly find him or herself barred from the courthouse door, or the defendant find him or herself liable on a presumably stale claim.³³⁵

Congress could easily have made section 313 retroactive without unfairly surprising litigants. Congress merely had to word section 313 so that it applied to all federal claims lacking explicit limitations periods which accrued after the effective date of the Act. The fallback statute would not have affected pending claims, and the passage of the statute would have given prospective litigants sufficient notice of the new limitations period. If Congress felt that more notice was necessary, it could have chosen a subsequent accrual date.³³⁶

Congress intended the Federal Courts Study Committee Implementation Act to enact some of the Federal Courts Study Committee's "noncontroversial recommendations."³³⁷ More controversial reforms were left for later consideration. Congress' real concern seems to have been that applying a four-year fallback statute retroactively would expand or contract existing, court-imposed limitations periods.³³⁸ This would probably generate at least some controversy. The House Re-

ation, if not a century or more, for such [future] claims to approach the mass already recognized in federal law and to which § 1658 does not apply").

332. H.R. REP. NO. 101-734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870.

333. *Id.*

334. *See supra* Part III. *See also* N.Y. ST. L. DIG., *supra* note 8, at 1 ("In other words, the very quantum of cases that manifest the need for a cure are cited as a reason for not offering it!").

335. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2785-86 (1991)(O'Connor, J., dissenting); discussion *supra* text accompanying notes 130-40.

336. H.R. 3553, which proposed a ten-year fallback statute of limitations, contained appropriate language limiting the bill's retroactive effect to prospective claims. *See supra* note 295.

337. H.R. Rep. No. 101-734, 101st Cong., 2d Sess. 15, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6861.

338. *See id.* at 24, *reprinted in* 1990 U.S.C.C.A.N. at 6870 (stating that "retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties").

port states that "the Committee was reluctant to apply this section [313] retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs."³³⁹

Applying a four-year time-bar to pre-Act federal actions would, in fact, lengthen many court-imposed limitations periods.³⁴⁰ Had Congress made section 313 retroactive, section 313 might have been viewed as a boon to plaintiffs. Indeed, defendants' bar might prefer having the courts continue borrowing statutes of limitations. Although the Supreme Court has not necessarily picked the shortest available limitations period, it generally does not borrow a long analog. For example, before *United Parcel Service, Inc. v. Mitchell*³⁴¹ and *DelCostello v. International Brotherhood of Teamsters*,³⁴² a number of courts borrowed the states' contract time-bars for hybrid § 301/fair representation labor claims.³⁴³ The states' statutes of limitations for contract actions tend to be relatively long, often six or more years.³⁴⁴ Other courts borrowed the states' arbitration time-bars, which are usually measured in months.³⁴⁵ In *DelCostello*, the Supreme Court held that a three-month arbitration statute of limitations was inappropriate for hybrid labor actions.³⁴⁶ However, the Court also rejected the state's six-year contract³⁴⁷ and three-year malpractice limitations periods.³⁴⁸ Instead, the Supreme Court borrowed a six-month time-bar from the National Labor Relations Act.³⁴⁹ Similarly, in *Gilbertson* the Supreme Court rejected the five-year statute of limitations governing insider trading claims, as well as the states' "blue sky" and fraud stat-

339. *Id.*

340. *See, e.g.,* *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991)(applying a one-and-three year limitations period to securities fraud actions implied under § 10(b) of the Securities Exchange Act); *Owens v. Okure*, 488 U.S. 235 (1989)(applying the state's general or residual limitations period to § 1983 actions); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983)(applying a six-month limitations period to hybrid § 301/fair representation labor actions).

341. 451 U.S. 56 (1981).

342. 462 U.S. 151 (1983).

343. *See, e.g.,* *Butler v. Teamsters Local 823*, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1252-53 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971).

344. *See, e.g.,* ALA. CODE § 6-2-33(1)(1975)(10 years); KY. REV. STAT. ANN. § 413.090(2)(Michie/Bobbs-Merrill 1992)(15 years for written contracts); MICH. COMP. LAWS ANN. § 600.5807(8)(West 1987)(six years); N.Y. CIV. PRAC. L. & R. 213(2)(McKinney 1990)(six years); OR. REV. STAT. § 12.080(1)(1991)(six years).

345. *See* *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 155, 166 & n.15 (1983).

346. *Id.* at 166-67.

347. *See id.* at 165-66.

348. *Id.* at 168-69.

349. *Id.* at 155.

utes of limitations.³⁵⁰ The Court held that securities fraud claims under § 10(b) of the Securities Exchange Act must be brought within one year of discovering a violation, but no later than three years from the date of the violation.³⁵¹

Furthermore, the Supreme Court has characterized most civil rights claims as personal injury claims for purposes of borrowing the most analogous state statute of limitations.³⁵² Although the states' general personal injury statutes vary from one to six years, the majority are two or three years.³⁵³ Only five states have personal injury periods of four or more years.³⁵⁴ A four-year fallback statute of limitations would thus expand the limitations period for most civil rights claims and some analogous claims.³⁵⁵ There is also some indication that states which have traditionally had longer personal injury statutes of limitations may be shortening them. For example, New Hampshire has reduced its six-year statute to three years.³⁵⁶ With the current impetus for tort reform and a more conservative bench as a result of the Reagan/Bush judicial appointments, defendants' bar may well prefer borrowing time-bars for existing federal causes of action rather than risking a Congressionally imposed, general time-bar.

Nevertheless, Congress should have risked potential controversy and made Section 313 retroactive. The uncertainty, inequity, and waste of resources under the current system of borrowing outweighs the problems that a four-year limitations period might cause for particular causes of action. In most instances four years would not unduly prejudice either plaintiffs or defendants, and Congress would

350. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2777-78 & n.1, 2781 (1991).

351. *Id.* at 2782. The Supreme Court also rejected a one-and-two-year period. *Id.* at 2780 n.5.

352. See *Owens v. Okure*, 488 U.S. 235 (1989)(§ 1983 claims); *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987)(§ 1981 claims); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir. 1987)(*Bivens* actions), *cert. denied*, 485 U.S. 934 (1988).

353. See, e.g., ARIZ. REV. STAT. ANN. § 12-542(1)(1992)(two years); COLO. REV. STAT. § 13-80-102(1)(a)(1989)(two years); MASS. GEN. LAWS ANN. ch. 260, § 2A (West Supp. 1992)(three years); MICH. COMP. LAWS ANN. § 600.5805(8)(West Supp. 1992)(three years); N.Y. CIV. PRAC. L. & R. § 214(5)(McKinney 1990)(three years); OHIO REV. CODE ANN. § 2305-10 (Anderson 1991)(two years); OR. REV. STAT. § 12.110(1)(1991)(two years); VA. CODE ANN. § 8.01-243(A)(Michie 1992)(two years); WIS. STAT. ANN. § 893.54(1)(West 1983)(three years).

354. FLA. STAT. ANN. § 95.11(3)(a)(West 1982)(four years); ME. REV. STAT. ANN. tit. 14, § 752 (West 1980)(six years); MO. ANN. STAT. § 516.120(4)(Vernon 1952)(five years); N.D. CENT. CODE § 28-01-16(5)(1991)(six years); WYO. STAT. § 1-3-105(a)(iv)(C)(1988)(four years).

355. See e.g., *Reed v. United Transp. Union*, 488 U.S. 319 (1989)(borrowing the state's general personal injury statute of limitations for a violation of a union member's right of free speech under the Labor-Management Reporting and Disclosure Act).

356. N.H. REV. STAT. ANN. § 508:4(I)(1992 Supp.)(eff. July 1, 1986).

remain free to supply a different limitations period for those cases where four years did prove to be inappropriate.

Moreover, restricting section 313 to prospective legislation may further complicate the borrowing process for claims arising under existing federal law. Arguably, section 313 can be viewed as a general policy statement that four years should govern federal claims when Congress is silent.³⁵⁷ Section 313 may thus provide yet another analog which courts and litigants must consider when borrowing the most analogous limitations period for pre-Act actions.

The most significant problem which section 313 may pose, however, is that it may lull Congress into inaction. Statutes of limitations generate little political interest. Having addressed part of the problem, Congress may feel little compulsion to supply either a general limitations period or specific time-bars for all of the federal causes of action existing on or before December 1, 1990, which lack statutes of limitations.

D. Options for Reform

Congress should amend Section 313 to deal with existing federal claims which do not have explicit statutes of limitations, including implied and federal common law claims. Several options are available.

The Federal Courts Study Committee recommended that Congress provide specific statutes of limitations for existing federal claims.³⁵⁸ It also recommended that Congress enact fallback time-bars for implied claims and any other federal claims without explicit limitations periods.³⁵⁹ The survey of existing federal statutes of limitations which the Report suggested has been completed³⁶⁰ and could be used to assist Congress.

Theoretically, the Committee's recommendations provide the best solution. To enact a statute of limitations for each existing claim, Congress would have to balance the interests pertaining to the particular federal right in question. This is the very balancing that Congress should have done in the first place.

However, the Committee's approach is impractical because it oversimplifies the legislative process. Hundreds of federal causes of action without explicit time-bars may exist. Identifying all of them, while possible, would be both difficult and time-consuming. Congress would then have to select an appropriate time-bar for each cause of action as well as enacting a fallback statute of limitations for implied and com-

357. N.Y. ST. L. DIG., *supra* note 8, at 2.

358. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE at 93 (1990).

359. *Id.*

360. Interview with Charles Geyh, *supra* note 312.

mon law claims. This process would be much more controversial and time-consuming than enacting one general limitations period. Congress' busy agenda and the lack of political interest in statutes of limitations make it unlikely that Congress will supply separate limitations provisions for existing federal claims, at least not in the foreseeable future.³⁶¹

Congress could also enact statutes of limitations for general categories of federal claims, similar to the states' practice. This approach would be an improvement over the current system of borrowing. However, Congress would have to agree on the categories and the appropriate limitations period for each category. States generally characterize claims by common law causes of action. However, federal causes of action are not necessarily comparable to common law categories, and those that are may be analogous to more than one common law action.³⁶² Some federal claims would arguably fall within more than one general category which would generate litigation and disputes among the courts.

Finally, Congress could amend section 313 to apply to all federal claims without explicit time-bars. Enacting a comprehensive "catch-all" statute of limitations would be the easiest and most practical solution to the problem. By wording the statute so that it applied only to claims accruing after the statute's enactment date, Congress would avoid unfair surprise to litigants. A simple answer to criticism that applying section 313 retroactively would favor plaintiffs is that Congress could choose a shorter limitations period. However, a comprehensive fallback provision would govern a number of important federal rights which embody a strong public policy in favor of having these rights asserted. These would include constitutional, discrimination, and environmental enforcement claims. Accordingly, Congress should choose a longer limitations period over a shorter one.

Four years would probably be an appropriate compromise for claims arising under existing federal law, as well as prospective legislation. The courts have generally borrowed state statutes of limitations, frequently the states' general personal injury,³⁶³ contracts,³⁶⁴ or

361. See M. Patrick McDowell, *Limitation Periods for Federal Causes of Action After the Judicial Improvements Act of 1990*, 44 VAND. L. REV. 1355, 1372-86 (1991) (recommending that Congress delegate the power to adopt specific limitations periods to the Judicial Conference or a commission or else establish a study committee to recommend specific statutes of limitations).

362. See *Tull v. United States*, 481 U.S. 412 (1987); *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990).

363. See, e.g., *Owens v. Okure*, 488 U.S. 235 (1989).

364. See, e.g., *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.7 (1966) (borrowing the state's contract statute of limitations for § 301 actions under the Labor Management Relations Act).

fraud³⁶⁵ provisions. The majority of the states' general personal injury statutes of limitations are somewhat shorter than four years, usually two or three years.³⁶⁶ However, their general contract statutes tend to be longer, often six or more years.³⁶⁷ Many of the states' statutes of limitations for fraud are also four or more years.³⁶⁸ Because a comprehensive fallback statute would apply to many different types of actions, it should not be unduly restrictive. In some instances, a four-year limitations period might also alleviate existing prejudice to plaintiffs where the courts have borrowed a particularly short period of limitations.³⁶⁹

Although four years would not be suitable for some causes of action, such cases should be relatively rare. Moreover, once a comprehensive fallback statute of limitations took effect, special interest groups would likely identify specific problem areas and pressure Congress into providing more appropriate time-bars where needed. Congress is more likely to address a few causes of action under pressure than it is to enact specific statutes of limitations for every federal cause of action which currently lacks a limitations period.

E. Additional Considerations

In amending Section 313, Congress should also address several related problems. During the hearings, the Justice Department urged Congress to exempt the United States from the fallback statute of limitations when the government acts as a plaintiff.³⁷⁰ Although a blanket exemption would be inappropriate, a limited exemption might have merit in particular areas. Effective enforcement and deterrence may require greater flexibility where the United States is suing to enforce environmental or employment anti-discrimination laws.³⁷¹ For example, a statute of limitations might prevent the EEOC from effec-

365. See *Nesbit v. McNeil*, 896 F.2d 380 (9th Cir. 1990), *overruled by* *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991).

366. See *supra* notes 353-54 and accompanying text.

367. See *supra* note 344.

368. See FLA. STAT. ANN. § 95.11(3)(j)(West 1982)(four years); MINN. STAT. ANN. § 541.05(6)(West 1988)(six years); N.Y. CIV. PRAC. L. & R. 213(8)(McKinney 1990)(six years); N.D. CENT. CODE § 28-01-16(6)(1991)(six years); WIS. STAT. ANN. § 893.93(1)(b)(West 1983)(six years).

369. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2788-90 (1991)(Kennedy, J., dissenting)(arguing that a three-year repose statute of limitations unfairly prejudices plaintiffs' ability to assert securities fraud claims); Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89, 142-45 (1985)(arguing that six-months is too short to protect employees' interests in hybrid § 301/fair representation cases).

370. *Hearing, supra* note 303, at 184, 198-99 (Statement of Stuart Gerson, Assistant United States Attorney General).

371. Assistant United States Attorney General Stuart Gerson's written statement to the House subcommittee concerning the fallback statute of limitations provides:

tively enforcing the nation's laws prohibiting employment discrimination because of the Agency's backlog of cases. Congress would need to clarify this issue.

Confusion might also arise over whether a comprehensive fallback statute of limitations would supercede other general limitations provisions. In particular, 42 U.S.C. § 1988 directs the courts to apply state law to supplement civil rights actions unless state law would be inconsistent with the Constitution or laws of the United States.³⁷² Congress would need to specify whether the new fallback statute or 42 U.S.C. § 1988 governed civil rights claims.³⁷³

As a general rule of construction, a more specific statute will apply over a general statute. Arguably, a federal fallback statute of limitations would be more specific than § 1988 because it would deal directly with statutes of limitations for federal claims without them. Section 1988 addresses statutory "gaps" in general. A federal fallback statute of limitations would close the limitations gap.

Policy also suggests that the federal fallback statute would govern civil rights actions. The current system of borrowing state law creates inequity in enforcing federal civil rights because the time in which to assert a right varies from state to state. Applying a federal time-bar would eliminate that inequity by creating a uniform limitations pe-

Furthermore, there are certain types of actions for which there is currently no limitations period applicable to the government and for which no statute of limitation is appropriate. For, example, there is no limitations period applicable to abatement actions under § 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606 (1988).

The government's ability to clean up sites presenting an imminent and substantial endangerment to the public health or welfare should not be curtailed by litigation over whether the cause of action arose when the release of a hazardous substance occurred, when it was discovered, or when the endangerment was determined. Nor should such actions be barred because a dangerous condition may have been in existence more than four years before the action was filed.

Id. at 199.

372. 42 U.S.C. § 1988 (Supp. 1991) provides in part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of [this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES,"] for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause

373. See *Hearing*, *supra* note 303, at 713-14 (Letter of Larry Kramer to the Hon. Joseph F. Weis, Jr. (Aug. 21, 1990)).

riod. Borrowing a state time-bar would thus be inconsistent with the purpose of the fallback statute, and by its own terms, § 1988 would not apply.

Nevertheless, § 1988 might be deemed the more specific statute. It applies specifically to civil rights actions and expresses Congress' intent that state law should supply missing provisions including limitations periods. A federal fallback statute of limitations would only apply where Congress had not supplied a limitations period. One could argue that § 1988 supplies a state time-bar for civil rights claims. To avoid litigation over this issue, Congress would need to clearly state that the new fallback statute of limitations governed civil rights actions under Title 42.³⁷⁴

VI. CONCLUSION

Statutes of limitations are not mere technicalities that can be ignored. They are a vital part of the underlying cause of action. Limitations periods determine the length of time that a plaintiff has to assert his or her claim, provide defendants with repose from stale claims, and help preserve both the accuracy and legitimacy of the judicial process. The Supreme Court has called them "fundamental to a well-ordered judicial system."³⁷⁵

The proper balancing of these interests is a legislative function, not one that should be forced upon the courts. Unfortunately, Congress tends to ignore limitations issues when enacting new federal rights. As a result, Congress has created numerous federal causes of action without explicit statutes of limitations. The courts must supply limitations periods for these actions by borrowing the most analogous state, or occasionally federal, time-bar. Borrowing, however, has generated uncertainty for litigants and the judiciary, inequitable administration of federal rights, and needless waste of resources.

Congress finally addressed part of the problem by enacting section 313 of the Judicial Improvements Act of 1990. Section 313 establishes a four-year, prospective fallback statute of limitations. Unfortunately, section 313 applies only to federal legislation passed after December 1,

374. The general statutes of limitations which provide a specific federal limitations period for specific types of actions should not present the same problem. For example, 28 U.S.C. § 2401(a)(1988) provides a six-year statute of limitations for nontort actions against the United States. Section 2401(a) would apply over the general fallback statute because it would be the more specific statute. *See also* 28 U.S.C. § 2415 (1988)(providing a six-year limitations period for contract actions brought by the United States); 28 U.S.C. § 2462 (1988)(providing a five-year general limitations period for government enforcement of a civil fine, penalty, or forfeiture).

375. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

1990. As a result, the majority of federal claims which lack statutes of limitations are still subject to the borrowing process and its problems.

Today, there is a strong demand to reduce congestion and inefficiency in the federal courts. Providing a comprehensive fallback statute of limitations for all federal claims which lack a limitations period would be a simple, relatively cost-free way to eliminate at least one source of inefficiency and congestion. A comprehensive fallback provision, applicable to claims accruing after the act's effective date, would provide a clear, easy-to-use rule for both litigants and the courts. More importantly, it would create uniformity. Plaintiffs' important federal rights and defendants' liability under the law would no longer vary from state to state and circuit to circuit, depending on which limitations period the courts borrow.

The survey of existing federal statutes of limitations which the Federal Courts Study Committee recommended has been completed and submitted to Congress. Congress must now complete the task that it began with section 313. It should enact a comprehensive fallback statute of limitations which will apply to both existing and prospective federal causes of action, including implied and federal common law claims. Hopefully, Congress will address this issue in the near future.

Finally, a fallback provision should not serve as a substitute for enacting specific statutes of limitations in the future. Congress must stop ignoring limitations issues when enacting new law and provide specific periods of limitations which reflect the appropriate balancing of interests for the rights created.